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## CURRENT EVENTS.

PROFESSIONAL CRIMINALS—At the last meeting of the American Bar Association in August, 1885, the Committee on Jurisprudence and Law Reform, made a report on a resolution which seems to have been pending in that body since 1882, suggesting the proper principle which should control the treatment of habitual and professional criminals.

After noticing the French practice on this subject which requires that persons convicted of serious crimes should remain for life under police supervision; and the "ticket of leave" system of England initiated in 1840, the report discusses the whole subject with marked ability, and concludes by recommending the adoption of three resolutions. The first favors the enactment of laws in every State, for keeping a complete record of every person convicted of felony or grave misdemeanor, for publishing such records, and exchanging them for like publications in other States, together with a free use of the photographer's art in aid of the cause of justice. Second, the committee recommends that in every State laws should be enacted, sentencing all persons who have been twice convicted of felony or grave misdemeanor to police supervision for life, or a stated term of years, and to political disfranchisement. Third, that drafts of such laws should be carefully prepared under the auspices of the association with a view to their adoption by the several States.

These resolutions produced a spirited debate which resulted in a postponement of the whole subject until the next meeting of the association.

The report and resolutions were briefly noticed in this JOURNAL soon after the adjournment of the association,[1] and we recur to the subject now chiefly to draw the attention of the profession to it, as the time is now near at hand when it will be again called up in the association, and will, no doubt, elicit a very exhaustive debate in that body. The line of legislation recommended by the committee seems so judicious and desirable, that we wonder, not a little, at the vehemence of the opposition manifested on the "skirmish line" of the preliminary debate—"so opposed to the teachings of Christianity, so inhuman," are very strong terms to apply to a proposition to enable officers of the law to "keep the run" of notorious and duly convicted malefactors. It is certainly not an outrage to require a person who has been pronounced by the law to be a suspicious or dangerous character, to report periodically at police headquarters and to give an account of himself, and, as in France, when he changes his residence, to do so only upon a passport, and upon his arrival at his destination, to pay the local authorities the compliment of a personal call. As to disfranchisement, we cannot see that it is either inhuman or unchristian to deny the felon the right to vote or hold office. There are so many men in the United States who are authorized, and generally ready and willing to do either, or both, that the country will probably survive even if the felon's name be stricken from the list.

The resolutions proposed by the committee appear to us well calculated to lead the minds of the profession, and of legislators, into a branch of jurisprudence which has been too much neglected: the prevention of crime. Except the peace warrant, the statutory destruction by officers of gambling implements, and of illicit distilleries, we cannot at this moment recall any cases in which the law acts upon the purely and literally preventive system. When the incorrigible rogue has served out his term in the State prison, he is at perfect liberty to resume the practice of his profession, without hindrance from the law, or serious molestation from its officers. He is not bound to give any account to any one of his coming and going, nothing can be done to prevent his committing another burglary whenever an eligible apportunity may be offered. The bully and *desperado* may be bound over to keep the peace after he has paid his fine or submitted to the imprisonment inflicted for his last fight, and no doubt thinks it an outrage that he can not be permitted to thrash any body for twelve long months; but against the burglar, expert and professional, as he is,

[1] 21 Cent. Law Journal, 241.

no such precaution, as the law stands, can be taken, and these resolutions are designed to furnish guards against theft and other crimes, equivalent, though not similar, to that furnished by the peace warrant against assault and battery. We can perceive no reasonable objection to this line of legislation. Burglary, shop-lifting, pocket-picking forgery, counterfeiting, are, especially in our large cities, as distinctly professions as law, medicine, or divinity, and their practice being pernicious to the public welfare, it is not unreasonable that they should be subjected to judicious regulation. It is true that the felon's feelings might be hurt by the extra publicity given under laws of this character, to his exploits, and his "mug," but then he should be patriotic enough to suppress his chagrin in view of the public good. If his reformation is retarded by periodical or occasional contact or association with the minions of the law, it is greatly to be deplored, but then in nearly every case, reformation is a thing to be hoped for, rather than expected, and we cannot think that public security should be jeopardized for the sake of so problematic a benefit as the reformation of a thief or a burglar. Felons like other wild beasts cannot be tamed unless they are caught young, and these resolutions do not contemplate the application of the proposed statutes to cases of juvenile offenders, or to others who are not confirmed or professional criminals.

It is true that police surveillance implies a certain stigma, as well as a want of confidence in the probity of the party watched. In this point of view it is certainly objectionable—to him. We cannot see why it is so to any one else. The stigma is a continuing condition of the felon's case, it attaches upon his conviction and usually outlasts, by years, his term of penal servitude, and this, with, or without subsequent police surveillance.

The objections to this line of legislation seem to us destitute of any foundation in reason, humanity or public policy. It is the duty of the State to protect the lives and property of its citizens against crime by all expedient and practicable means, and if those means are in any respect inconvenient to the criminals, either before or during, or after the commission of the crime, so much the better for the people, and so much the worse for the criminals.

## NOTES OF RECENT DECISIONS.

DEDICATION TO PUBLIC USES—AT COMMON LAW AND BY STATUTE—ACCEPTANCE OF DEDICATION — EFFECT OF SUBSEQUENTLY CREATED MUNICIPALITY.—In a recent case[1] in the Supreme Court of Illinois, the question was presented, what constitutes a dedication to public uses, and also several collateral questions relating to that subject. It appears that the Maywood Company, a private corporation, purchased a tract of over five hundred acres of land in the vicinity of Chicago, laid it out in lots, and proceeded to advertise it very vehemently as a suburban village in the highest degree desirable as residence property, and, indeed, for almost any other use. In its numerous and repeated publications, in pamphlet form and otherwise, the company assured the public that block No. 58, containing sixteen acres in the plan of the village, was devoted to public uses as a park, and by description and pictures gave a most flattering account of its present, and presumably prospective, attractions as a pleasure ground, enumerating and displaying lakes, bridges, grottoes, well-house, observatory, music stand, and other like attractions. The purchase of the company was made in 1869, and from that time to 1881 residents had used the park for public purposes. In October, 1881, the village was incorporated under the general incorporation law, and a month earlier the Maywood Company had made a trust deed to Botsford to secure certain bonds. This suit was brought in consequence of the refusal of the Maywood Company to transfer to the municipal authorities of the village of Maywood the control of the park, and to convey the title to it.

The court says: "The facts above recited indicate an intention, on the part of the Maywood Company, to dedicate block 58 (with the exception of the hotel and hotel grounds, covering the north 168 feet of the west 287.55 feet of said block) to the public for the purposes of a park. A dedication may be made by grant or other written instrument, or it may be evidenced by acts and declarations without writing. No particular form is requisite to the validity of a dedication. It is

[1] Maywood Company v. Village of Maywood, N. E. Repr., Vol. 6, 886.

merely a question of intention. A dedication may be made by a survey and plat alone, without any declaration, either oral or on the plat, when it is evident from the face of the plat that it was the intention of the proprietor to set apart certain grounds for the use of the public.[2] The difference between a statutory and common-law dedication is that one vests the legal title to the ground set apart for public purposes in the municipal corporation, in trust for the public, while the other leaves the legal title in the original owner, charged, however, with the same rights and interests in the public which it would have if the fee was in the corporation."[3]

Although during all the years that elapsed between the first announcement of the dedication to public uses, of the block (58), the legal title continued in the Maywood Company, it was from that time charged with a trust in favor of the public, for the use of the block as a public park. And during all that time the acceptance of the dedication by the public was indicated, as far as it could be, by the actual use of the park as a pleasure ground, and all those purposes of recreation for which public parks are laid out.[4]

The law in such a case as that under consideration, is, that when one sells lots with avowed reference to such an easement, privilege, or advantage, as the use of streets, public grounds, or other like inducements to a purchase, the easements, etc., so avowed, are, if within the control of the vendor, guaranteed by him, and are, in fact, appurtenant to the property conveyed to the vendee.[5] And in such a case the vendor is estopped from revoking the dedication of such easements to public uses, and so are all persons claiming under him, who are affected by notice, actual or constructive, of the trust. And if there has been any such disavowal by the vendor of the trust in the easements to the benefit of which the vendee is entitled, equity will interpose. It is the province of equity to prevent the perversion of trusts.[6] For the rest, the essential part of a dedication of lands to public uses is the intention of the party to make the dedication; this may be evidenced by the most solemn legal instruments, or by the most ordinary of acts *in pais*. The intention, however, must be manifested in such a manner that there can be no controversy about it.

In Illinois there is a mode of dedication to public uses prescribed by statute. That mode was not pursued in the case under consideration, but the court held that the validity of the dedication was not impaired by that circumstance, that when there is a statutory dedication prior to the creation of a municipal body empowered to receive it, the fee remains in abeyance until such a corporation is formed, and then vests in the corporation as soon as it is created.[7] If the dedication is a common law dedication, under such circumstances, the fee remains in the dedicators, subject to the uses for which it was dedicated, and upon the formation of a municipality, the uses of the public, vest in that municipality. And in an action to enforce such a trust, the individual beneficiaries of the trust have such an interest in it that they may be joined with the municipality.

[2] Godfrey v. City of Alton, 12 Ill. 30; Warren v. Town of Jacksonville, 15 Ill. 236; Waugh v. Leech, 28 Ill. 488; Smith v. Town of Flora, 64 Ill. 93.

[3] Chicago, R. I. & P. R. Co. v. City of Joliet, 79 Ill., 25.

[4] Smith v. Town of Flora, *supra;* Rees v. City of Chicago, 38 Ill. 322.

[5] Zearing v. Raber, 74 Ill. 409.

[6] City of Jacksonville v. Jacksonville, etc, Co. 67 Ill. 540.

[7] Canal Trustees v. Haven, 11 Ill. 554.

## SHARES OF STOCK — CREDITORS AND ASSIGNEES OF CERTIFICATES.

Considering the magnitude of the interests involved, no questions of greater importance can arise than those which affect the sale and transfer of shares of stock in incorporated companies. It is absolutely necessary for the security of such investments, that some certain and unvarying mode of transferring title to them should be firmly established and strictly adhered to, yet no such mode, obligatory alike in all cases, has been established. The judges have not agreed, either as to general principles of law relating to the subject, or as to the weight to be given to the considerations peculiar to each case.

It is proposed to discuss one of the many phases of the controversy, and examine as

far as is practicable in a brief space, this question; when does an assignment of stock in a corporation become effectual as to the creditors?

1811. The first case upon the subject is, U. S. v. Vaughn,[1] which decides that the assignment of the certificate transfers the title to the stock. It proceeds upon the theory that a share of stock is in the nature of a chose in action, that after the assignment of a chose in action, it is not attachable as the property of the assignor, and that the authorized by-law of a corporation requiring transfers of stock to be registered on its books, is for the protection of the company, and not for the benefit of the creditors of its stockholders.

1840. It is followed in Commonwealth v. Watmough.[2] In this case, counsel for the creditor urged that a sale of property unaccompanied by delivery, is void at common law, and that the proper mode of delivering shares of stock is to transfer them upon the books of the company, in conformity with its by-laws. The court overrule this suggestion on the ground, that as creditors have not access to the books of a corporation, such delivery would not avoid the fraud which it was the design of the common law to preclude.

1841. In Fiske v. Carr[3] a different conclusion is reached, but it seems to be based upon a statute of Maine, expressly declaring that title to stock shall not pass unless the transfer be entered upon the books of the company.

1840. Dutton v. Connecticut Bank,[4] and Eastman v. Fisk,[5] however, are directly in conflict with the Pennsylvania cases. They hold that a sale of shares of stock which is not recorded in conformity with the rules of the company, is fraudulent and void as to the creditors of the assignor, because the property is not delivered.

1855. In Fisher v. Essex Bank,[6] Judge Shaw delivered an elaborate opinion to the same effect, placing however, the rights of creditors, who attach before the transfer of stock is recorded, where the charter of the company provides that shares should be transferable only on the books of the company, on a somewhat different basis. The learned judge, while admitting that at common law a share of stock may be assigned without a transfer on the books, holds that such a provision of the charter overrides the common law. He meets the suggestion that the provision is for the protection of the corporation only, as follows: "If we may judge of the intended operation of an act of legislation from the useful and beneficial purposes it may tend to promote, we should construe such a provision as having a much broader scope. As a great amount of property in Massachusetts is held in shares of corporations, it is important that title to them be easily and certainly ascertained, that the mode of alienating and acquiring it be fixed and known, and that it may at any time be made available by process of law for the payment of debts of the owner. In no other way can these objects be so well accomplished as by a transfer at the bank. The law might have provided that the bearer of the certificate should be the owner, so that it might pass from hand to hand by mere manual delivery; but this would have been attended with almost inextricable difficulties. The shares could never be attached, for the officer could have no means of obtaining possession of the certificate, yet without it, shares might pass to innocent purchasers without notice. It is of great importance that this large amount or property should be attachable and liable to execution. This has long been the policy of this State, and it is provided that the attachment may be levied by leaving a written notice at the office of the company. It is necessary to fix some act and some point of time at which property vests in the vendee, and it will tend to the security of all parties to make this turning point consist in an act which, whilst it may be easily proved, does at the same time give notoriety to the transfer."

1856. This case is followed in Boyd v. Cotton Mills,[7] and Blanchard v. Gas Light Co.,[8] and is endorsed by Judge Redfield, of

[1] 3 Binn, 400, 1811.
[2] 6 Whart. 138, 1840.
[3] 20 Me. 301, 1841; see also Weston v. Mining Co., 5 Cal. 187-; 6 Cal. 425, 1856; 35 Cal. 653, 1868; 53 Cal. 428, 1879.
[4] 13 Conn. 497, 1840.
[5] 9 N. H. 182, 1843.
[6] 5 Gray, 371, 1855.
[7] 7 Gray, 408, 1856.
[8] 12 Gray, 215, 1858.

Vermont.[9] In both of these cases, however, the charter provided only that shares might be transferred by writing, recorded by a clerk of the company in a book to be kept for that purpose.

1860. Two years later the Supreme Court of New Jersey,[10] made a ruling contrary to the Massachusetts decision, and held that even where the charter declares that shares shall be transferable only on the books of the company, the holder of a certificate has a better right than a creditor attaching before the assignment is entered upon the books. In their opinion the charter provision is intended for the protection of the corporation, and does not affect the law of sales. The Supreme Court of Connecticut decided in the same year[11] that a sale of shares, which is not recorded according to the rules of the corporation, is fraudulent and void as to subsequent attaching creditors, and, in 1862, the Circuit Court of the United States[12] held that where the certificate recites that shares are transferable on the books of a company, title does not pass until the transfer is actually recorded, without regard to the provisions of the charter or by-laws, and the Supreme Court of Massachusetts rendered a decision affirming its earlier cases.[13]

1868. Finney's Appeal,[14] a Pennsylvania case, follows Commonwealth v. Watmough, in deciding against the right of the attaching creditor where the certificate has been assigned prior to the attachment.

1871, In 1871 the Supreme Court of New Hampshire[15] held that even in the absence of any rule or regulation on the subject, a sale without entry on the books is void as to creditors under the general policy of law relating to fraudulent conveyances.

1873. In 1873 a New York court[16] held that a transfer of the certificate was sufficient delivery of the stock within the reason of said law, notwithstanding a provision of the charter of the company requiring transfers to be registered, and expressly declaring that no transfer should be valid until recorded.

1879. The last case was indorsed by the Supreme Court of Louisiana, six years later,[17] but in the same year in which this opinion was delivered, the Supreme Court of Illinois rendered a directly contrary decision, resting upon the reasoning of the New England cases, and condemning the New York and New Jersey cases.[18]

1880. To add to the confusion, in 1880 the Massachusetts judges established what seems to be an exception to the rule laid down in Fisher v. Essex Bank.[19] They decide that in the absence of an express provision of law invalidating unrecorded transfers, the holder of the certificate has a better right than the attaching creditor where the by-laws of the company require transfers to be registered, whereas Judge Shaw intimates that such a case might come within the rule announced by him.

1881. This last opinion is followed by a decision of Judge Lowell, criticising Fisher v. Essex Bank, and the Illinois cases, and going to an extreme length in favor of certificate holders. He affirms that certificates are quasi negotiable instruments, and that one who holds them is to be preferred not only to a creditor of the assignor, but to a subsequent assignee on the books of the company. He adopts the principles of law announced in U. S. v. Vaughn, as to the relative rights of assignees, of choses in action, and creditors of the assignor.[20] In the same year the Supreme Court of Wisconsin made a decision

[9] 1 Am. Railway Cases, 126, 1870.
[10] Bank v. McElrath, 13 N. J. Eq. 26, 1860.
[11] Shipman v. Aetna Ins. Co., 29 Conn. 253, 1860.
[12] Williams v. Mechanic's Bank, 5 Blatch. 60, 1862.
[13] Rock v. Nichols, 3 Allen, 342, 1862.
[14] 59 Pa. St. 398, 1868.
[15] Scripture v. Scapstone Co., 50 N. H. 583, 1871.
[16] Smith v. Am. Coal Co., 7 Lans. 317, 1873.

[17] Griedlander v. Slaughter House Co., 31 La. An. 525; see also State v. N. O. & C. R. R., 30 La. An. 308, 1878.
[18] People's Bank v. Gridley, 91 Ill. 457, affirmed 99 Ill. 360.
[19] Cory v. Music Hall Ass., and Dickinson v. Cent. Nat. Bk., 129 Mass. 437, see also Sibtey v. Quincy Nat. Bank, 133 Mass. 515, 1882. Judge Shaw intimated that where the charter authorized a by-law on the subject, such a by-law might have the force of a charter provision, and none of the decisions following Judge Shaw base the conclusion on the peculiar provision of the charter in Fisher v. Essex Bank; see provisions of charters in cases cited under notes 7, 8, 9, 12, 15, 18. Moreover the cases against the right of the attaching creditor are not made to depend on the absence of any such provision, except the two, first cited in this note. Others disregard the most positive provisions of charters on the ground that they are intended for the protection of the corporation only, notes 10, 16, 17, 20.
[20] Continental Bank v. Elliot Bank, 7 Fed. Rep. 500, 1883.

quite contrary to Judge Lowell's, both in reasoning and conclusion.[21]

1883. Finally, in 1883, the Circuit Court of the United States affirmed the opinion of Judge Lowell.[22]

Besides these cases, directly in point, many others are cited, which contain dicta on the subject. For example, an opinion of Judge Story[23] is frequently referred to as establishing the principle, that charter provisions requiring transfers of stock to be registered, are for the benefit of the company only, yet in the case cited he expressly disclaims any opinion on this point,[24] and in a subsequent decision uses the following significant language: "No person, therefore, can transfer the legal title to any shares except by a transfer according to the rules of the bank, of which the purchaser is bound to take notice."[25] Judge Miller, of the U. S. Supreme Court, in a case where the rights of creditors were not involved,[26] used very strong language as to the character and effect of certificates, which has often been cited to strengthen an opinion against creditors, but Mr. Justice Field, of the same court, in a later decision says: "Entry of the transfer on the books of the company is necessary to protect the seller against subsequent liability as a stockholder, and perhaps also, to protect the purchaser against the proceedings of the creditors of the seller."[27]

Enough has been said to exhibit the hopeless confusion that has for a long time prevailed upon the subject. *Melius est petere fontes quam sectari rivulos.*

We believe that the question under consideration, in its ultimate analysis, must resolve itself into an inquiry whether or not the failure of the assignee of a certificate to register the transfer on the books of the company in conformity with its rules, is such evidence of fraud, actual or constructive, as will invalidate the sale.[28]

An unquestioned rule relating to the delivery of personal property has not yet been established. The obligation of a vendee to the creditors of the vendor depends upon the circumstances of each case. Mr. Bump, in his work on Fraudulent Conveyances says: "The history of the law respecting the rights of creditors, in relation to the property of debtors, sold, assigned, or mortgaged, but remaining in the possession or under the control of said debtors, presents a perpetual struggle between a general rule of policy on the one side, designed to cut off the possibility of fraudulent or collusive sales, and on the other side, the obvious hardship of numerous particular cases, where the innocent and even benevolent intention of parties was manifest and the presumption of fraud appeared oppressive."[29] He declares that to the general presumption of fraud under such circumstances, twenty-four exceptions at least have been made.[30] We are not prepared to canvass the cases upon this subject. It may safely be asserted, however, that a presumption of fraud arises wherever the consequences of neglect to take possession of property purchased, may be to injure third parties, and that this presumption becomes conclusive whenever such injury is the probable or inevitable consequence of such neglect. The rule is based upon well recognized principles of policy, and is designed to preclude the possibility of fraud. The kind of delivery required, manifestly depends upon the character of the property; but it must in all cases be such as will best observe the policy above declared.[31]

[21] Application of Thos. Murphy, 51 Wis. 522, 1881.

[22] Scott v. Pequonnock Bank, 15 Fed. Rep. 500, 1883.

[23] U. S. v. Cutts, 1 Sumner, 138, 1832.

[24] At page 150.

[25] Union Bank v. Laird, 2 Wheat. 390, 1817.

[26] Bank v. Lanier, 11 Wall. 369, 1871.

[27] Johnson v. Laflin, 103 U. S. 800, 1881, see also Merchant's Nat. Bank v. Richards, 6 Mo. App. 454, 1879, where both Corporation and purchaser at sale had notice of the certificate, and a presumption of fraud could not have arisen, 58 Cal. 600; 9 Mo. 154; 13 Mo. App. 199; 20 Mo. 385: 52 Mo. 379; 6 Cent. L. J. 124; 10 Ala. 82; 53 Ga. 532; 46 N. Y. 329; 11 S. C. 520; 39 Gratt. 502; 11 Wall. 69; 9 Pick. 202; 11 Wend. 627; 22 Wend. 352; 10 Ind. 502; 8 Pick. 90; 20 Wend. 91; 34 N. Y. 30: 6 Hill, 627.

[28] Lowell on The Transfer of Stock, 103; Colt v Ives, 21 Conn. —— 29 Conn. 245; 10 Pick. 454; Weston v. Bear River Co., 6 Cal. 425; 35 Cal. 653.

[29] Bump Fraud. Con., ch. 5.

[30] Id. page 62 and note.

[31] Lord Coke, Twyne's Case, 3 Coke, 80; Lord Bacon quoted, Dearle v. Hall, 3 Russ. 1; Lord Mansfield, Cadogan v. Kennett, Cowp. 432; Lord Harkwicke, Ryall v. Rolle, 1 Atk. 165: Lord Eldon, Dearle v. Hall, and Loveridge v. Cooper, 3 Russ. 1 & 38; Buller J. Edwards v. Harben, 2 T. R. 587; Lord Lyndhurst Foster v. Cockerell, 9 Bling. N. R. 332; Pothier Contracts, Cush Ed. 201 C. 2, 20; Domat. P. P. I. b. 1 T. 2 § 1 Arts. 9, 11; Benj. on Sales § 675, n. d; Bump. Fraud Convs, 177; Hamilton v. Russell, 1 Cranch. 309; 32 P. F. S. 451; 9 Pick. 349, 4 Camp. 251; 1 Taunt. 458; 2 Camp. 243; 7 Taunt. 288; 17 Mass. 113; 2 C. P. L. R. 525.

In the light of these principles we think the conclusion inevitable, that shares of stock must, like other personal property, be delivered at the time of sale or within a reasonable time, thereafter, and that a transfer on the books, in conformity with the rules of the company, is the mode of delivery best calculated to defeat the evils which delivery was designed to preclude. Delivery of the certificate will not answer the purpose. A certificate of stock is not a negotiable instrument; it has none of the attributes of such instruments. After its assignment, the title of the holder may be defeated in a variety of ways, and even at the time of the assignment the assignor may have had nothing to dispose of, notwithstanding his possession of the certificate.[32] A purchaser of shares of stock therefore, may not rely upon such security. If he wishes to protect himself against all contingencies, he must register the transfer, In no other way can all risks be avoided. Moreover, until the transfer is entered upon the books of the company, the purchaser is not entitled to vote or receive dividends, or share in any of the benefits of the association; his vendor may still enjoy these benefits. On the other hand, by failing to register, he escapes the responsibilities which attach to membership. He cannot be sued by the creditors of the corporation, or held for assessments. If a man neglects to do what is necessary for his protection, or what he is expected to do under the circumstances, the presumption fairly arises that his omission is fraudulent in fact; if the effect of such neglect is to injure others, it is fraudulent in law. For this reason it has always been held that one who purchases stock from one who appears on the books to be the owner, is to be preferred to the holder of the certificate.[33] Why should not the creditor of the stockholder of record receive the same protection? The same presumption of fraud arises, the same opportunity for fraud exists. A man indebted, wishing to avoid payment, can readily transfer his certificate and thereby avoid responsibility; nothing could be easier.

[32] See cases collated 22 Cent. Law Journal, 269.

[33] Cady v. Potter, 55 Barb. 463, 1869; N. Y. R. R. v. Schuyler, 34 N. Y. 79, 1865; Greenleaf v. Ludington, 15 Wis. 568; Black v. Zacherie, 3 How. 483, 512; Boatmans Ins. Co. v. Alfe, 48 Mo. 137; *dictum contra*, 15 Fed. Rep. 500.

And not only may the stock thereby be removed from the reach of the assignor's creditors, but it may be placed beyond the reach of the assignee's creditors. It has been held that the interests of a holder of a certificate, whose name does not appear on the books of the company, cannot be reached by attachment or execution.[34] Surely the courts should be reluctant to provide such facilities for the commission of fraud as would grow out of the rule declared by many of the judges. Proof of actual fraud is notoriously difficult. It was to avoid this difficulty that the rule requiring delivery was originally established. In addition to these reasons, founded upon policy, a strong and positive argument may be drawn from certain acts of legislation, why a rules which requires transfeas of stock to be entered upon the books of the corporation should be established. As pointed out by Judge Shaw, most of the States have enacted laws providing that shares of stock shall be levied on by notice to the proper officer of the company. These acts furnish strong evidence of a legislative intent to subject property of this nature to the payment of debts. In no other way can this purpose be accomplished, except by declaring unrecorded transfers to be void. If the certificates are made negotiable, or even *quasi* negotiable, the enormous property represented by these instruments is practically placed beyond the reach of creditors. This great evil should, if possible, be avoided. It can be avoided by making the books conclusive evidence of ownership. If such a rule would embarrass speculation, and make stock jobbing more difficult, it has the merit of affording the amplest security to honest investment. Finally, we believe that the rule should not be made to depend upon the special provisions of corporate charters. Although men are presumed to know these provisions, as a matter of fact, they are usually ignorant of them. Whether the charter or by-laws or certificates provide that transfers should be registered, the reasons for the rule still exist. It is founded upon principles of policy, strong alike in all cases, and should

[34] Lippit v. Wood Paper Co., 1 N. Y. 118; Beckwith v. Burrough, 13 R. I. 298; Language of Judge Shaw, 5 Gray. 371.

not be made to depend on slight or trivial circumstances.[35] ISAAC H. LIONBERGER.

St. Louis.

[35] See also Brock v. Ratton, I. U. C. C. P. 222; Hamberstone v. Chase, 2 Y. & C. 209; Broadhurst v. Varley, 12 C. R. N. S. 212; Watts v. Porter, 23, L. J. Rep. Q. R. 346; Shropshire U. R. & C. Co. v. Reg., 7 I. R. H. I. C. S. 496.

## DELIVERY OF DEEDS.

*Necessity of Delivery.*—A delivery is essential to give effect to a deed,[1] whether it be a conveyance founded upon a valuable consideration, or a mere voluntary conveyance.[2] Thus a deed takes effect from the time of the delivery, and not from the time of the date[3] though the date is presumptively the true time of its execution and delivery.[4] And without a delivery on the part of the grantor, which act is the consummation of the conveyance[5] all the preceding formalities are unavailable to impart validity to it as a solemn instrument of title.[6] Nor can a valid deed once delivered be defeated by any subsequent act,[7] unless by virtue of a condition in the deed itself.[8] But the deed of a corporation need not be delivered, since the corporate seal gives perfection to the instrument without further ceremony.[9] And so title by patent from the United States is title by record[10] and the delivery of the instrument to the patentee is not essential to pass the title.[11]

*Acceptance.*—A complete delivery of a deed requires its acceptance by the grantee,[12] but such acceptance is always presumed,[13] if the deed is found in the grantee's hands.[14]

Yet under the rule that to constitute delivery of a deed there must not only be delivery by the grantor, but an acceptance by the grantee, there is no valid delivery where the minds of the parties seem never to have met upon the subject of the execution and delivery of a deed by a wife of her lands in settlement of her husband's defalcation as cashier of a bank;[15] as when neither before nor after the discovery of the deficit in the accounts of the cashier was there any meeting of the Board of Directors of the bank to consider the accounts; and at no time during the individual transactions of some of the directors with the cashier in relation to his accounts with the bank, or the possession of the deed by one of the Directors, did the Board of Directors at a regular meeting by resolution or otherwise authorize a settlement with the cashier upon the basis of a conveyance to the bank by his wife of her separate real estate.[16]

When the question is as to whether a deed was delivered and accepted, and there is evi-

[1] Bank v. Bailhace, 3 W. C. Rep. 140; S. C. 4 Pac. Rep. 106.

[2] Jones v. Jones, 9 Conn. 111; 16 Am. Dec. 35; Stiles v. Brown, 16 Vt. 563; Fisher v. Hall 41 N. Y. 421, 422; Critchfield v. Critchfield, 24 Pa. St. 100; Rutledge v. Montgomery, 30 Ga. 641; Armstrong v. Stovall, 26 Miss. 275; Younge v. Gailbeau, 3 Wall 641.

[3] Egeny v. Woodward, 56 Me. 45; Harrison v. Phillips Academy, 12 Mass. 455; Jackson v. Bard, 4 Johns, 230; Harman v. Oberdorper, 33 Gratt (Va.) 497; Hood v. Brown, 2 Ohio 267; Nay v. Mograin 24 Kan. 75. But see Smith v. Porter 10 Gray 67; Elsey v. Metcalf, 1 Denio, 323.

[4] Jackson v. Bard, 4 Johns 230.

[5] Boone Real Prop. 295. (Summary of principles governing delivery of deeds. Hulick v. Scovil, 4 Gilm, (Ill.) 59; quoted Hibberd v. Smith, 4 Pac. Rep. 480.)

[6] Goddard's Case, 2 Rep. 4 *b*; Brown v. Brown 66, Me. 316; Fisher v. Beckworth, 30 Wis. 55; Younge v. Gailbeau, 3 Wall 641. (Until delivery of a conveyance with intent that it shall operate as a deed, it does not take effect and such intent may be a question of fact, to be ascertained from all the circumstances; Hibbard v. Smith, 4 Pac. Rep. 473.

[7] See citations contained in succeeding note.

[8] 2 Wash. Real Prop. 577; Hawkstand v. Gatchell, Cro. Eliz. 835; and see Prutsman v. Baker, 30 Wis. 644; 11 Am. Rep. 592.

[9] See Derby Canal Co. v. Wilmot, 9 East 360; Boone Corp. 54.

[10] United States v. Schurz, 102 U. S. 378, 397.

[11] United States v. Schurz, 102 U. S. 378, 397; Boone Real Prop. 295.

[12] Ward v. Winslow, 4 Pick 518; Stewart v. Redditt, 3 Md. 67; Corner v. Baldwin, 16 Minn. 172; Best v. Brown, 25 Hun. 223. Compare Commons v. Jackson, 10 Bush Ky. 424. (The assent of the grantee is a necessary element to the delivery of a deed whether the delivery be actual or constructive. Hibbard v. Smith, 4 Pac. Rep. 473.

[13] See citations contained in next note.

[14] Chandler v. Temple, 4 Cush. 235; Jones v. Swayze, 42 N. J. L. 279; Newlin v. Beard, 6 W. Va. 110; Southern Life Ins. Co. v. Cole, 4 Fla. 359; Boone Real Prop. 295; and see Little v. Ginson, 39 N. H. 501; Morris v. Henderson, 37 Miss. 501; Goodwin v. Ward, C. Baxt. (Tenn.) 107; Roberts v. Swearingen, 8 Neb. 363. (Greater presumption of acceptance in favor of infants; Rivard v. Walker, 39 Ill. 413.)

[15] Bank of Healdsburg v. Bailhace, 3 W. C. Rep. 140; S. C. 4 Pac. Rep. 106.

[16] Bank of Healdsburg v. Bailhace, 3 W. C. Rep. 140; s. c. 4 Pac. Rep. 106. Distinguishing Crowley v. Genesee Manufg. Co. 55 Cal. 275; McKieman v. Lenzen, 56 Cal. 61; Seeley v. San Jose etc. Co., 59 Cal. 23; Shaver v. Bear River etc. Co., 10 Cal. 400, Citing Gachwiles v. Willis, 33 Cal. 11; Blen v. Bear River Co., 20 Cal. 602.

dence showing that the grantor had the deed recorded, and the entire course of conduct of the grantee indicates an acceptance, a finding and judgment that there was a delivery and acceptance will not be interfered with, although there may be evidence to the contrary.[17]

*Requisites of Delivery.*—No set formulary of words or acts is necessary to a valid delivery;[18] but it may be done by acts or words, or by both combined;[19] by the grantor himself,[20] or by another by the grantor's precedent or assent subsequent;[21] and it may be made to the grantee personally,[22] or to another authorized by the grantee to accept it,[23] or to a stranger with a subsequent ratification.[24] And it is immaterial, although the deed does not reach the grantee until after the death of the grantor,[25] if it was previously left with a third person for his use.[26] But to constitute delivery good for any purpose, the grantor must divest himself of all power and dominion over the deed;[27] and it is with reluctance that the courts will uphold a deed executed by the grantor, but retained in his possession[28] to take effect after his death.[29]

*Parting with Control, etc.*—The term "delivery" implies a parting with the possession, and a surrender of authority over the deed by the grantor at that time, either absolutely or conditionally;[30] absolutely if the effect of the deed is to be immediate, and the title is to pass at once to the grantee,[31] but conditionally, if the operation of the deed is made dependent on the performance of some condition, or the happening of some subsequent event.[32] And if the deed is subject to be recalled by the grantor, before delivery to the grantee, it is held to be no delivery on the part of the grantor,[33] although he should die without recalling it.[34]

*Delivery in Escrow.*—Delivery to a stranger, for a third person, of an intended deed, of which delivery such third person is not informed, does not, by relation, when such third person accepts the deed, operate to defeat a right acquired under a judgment lien against the grantor between the time of delivery to the stranger and acceptance by the grantee.[35]

*Ineffective Delivery.*—One of the essential requisites of a good deed is that it be delivered by the grantor or his attorney.[36] For a

[17] Vaughan v. Godman, 3 N. E. Rep. 257.

[18] Thoroughgoods' Case 9 Rep. 136; Hatch v. Bates, 54 Me. 139; Mills v. Gore, 20 Pick. 36; Verplanch v. Steny, 12 Johns. 536; 7 Am. Dec. 348.

[19] Brown v. Brown, 66 Me. 316; Warren v. Sweet, 31 N. H. 332; McClure v. Colclough, 17 Ala. 89; Burkholder v. Casad, 47 Ind. 418.

[20] See citations given in next note.

[21] Brown v. Brown, 66 Me. 316; Foster v. Mansfield, 3 Met. 412; March v. Austin, 1 Allen 238; Mather v. Cortiss, 103 Mass. 568; Hathaway v. Payne, 34 N. Y. 92; Fisher v. Hall, 41 id. 416; Stephens v. Rinehart, 72 Pa. St. 434; Duncan v. Pope, 47 Ga. 445; Morgan v. Hezelhurst Lodge, 53 Miss. 674; Stone v. Duvall, 77 Ill. 475; Doe v. Knight, 5 Barn & C. 671.

[22] See succeeding citations to this portion of sentence.

[23] Hatch v. Bates, 54 Me. 136; Stilwell v. Hubbard, 20 Wend. 44; Eckman v Eckman, 55 Pa. St. 269; Cin. etc. R. R. Co. v. Iliff, 13 Ohio St. 235.

[24] Turner v. Whidden, 22 Me. 121; Brown v. Brown, 66 id. 316; Fisher v. Hall, 41 N. Y. 423; Chamberlain v. Woodward, 22 Hun. 440.

[25] Boone Real Prop. 295.

[26] Foster v. Mansfield, 3 Met. 412; Goodell v. Pierce, 2 Hill 659; Thatcher v. St. Andrews Church, 37 Mich. 264; McLean v. Nelson, 1 Jones L. (No. Car.) 396; Compare Fisher v. Hall, 41 N. Y. 416; Prutsman v. Baker, 30 Wis. 644; 11 Am. Rep. 592.

[27] Young v. Gailbeau, 3 Wall. 641; Parmellee v. Simpson, 5 id, 81; Tilebals v. Jacobs, 31 Conn. 428; Oliver v. Stone, 24 Ga. 63.

[28] Boone Real Prop. 295.

[29] See Patterson v. Snell, 67 Me. 559; Sluntleff v. Francis, 118 Mass. 154; Jones v. Jones, 6 Conn. 111; 16 Am. Dec. 35; Ruckman v. Ruckman, 32 N. J. Eq. 259; Davis v. Williams, 57 Miss. 843; Mitchell v. Ryan, 3 Ohio St. 382; Huey v. Huey, 65 Mo. 689; Walker v. Walker, 42 Ill. 311; Stone v. Miller, 16 Iowa 460; Newton v. Bealer, 41 id. 334; Burnett v. Burnett, 40 Mich. 361.

[30] Prutsman v. Baker, 30 Wis. 644; 11 Am. Rep. 592; and see Merrills v. Swift, 18 Conn. 257; Jones v. Swayze, 42 N. J. L. 279; Bary v. Anderson, 22 Ind. 39.

[31] Boone Real Prop. 295; and see 1 Bouv. L. Dict. tit. Delivery.

[32] Prutsman v. Baker, 30 Wis. 644; 11 Am. Rep. 592; and see Hagood v. Harley, 8 Rich. (So. Car.) 325; Kane v. Machin, 17 Miss. 387; Gibson v. Partee, 2 Dev. & B. (No. Car.) 530; Henrichson v. Hodgen, 67 Ill. 179.

[33] Cook v. Brown, 34 N. H. 460; Jacobs v. Alexander, 19 Barb. 243; Fitch v. Bunch, 30 Cal. 213.

[34] Brown v. Brown, 66 Me. 316; Prutsman v. Baker, 30 Wis. 644; s. c. 11 Am. Rep. 592; Boone Real Prop. 295. But compare Delden v. Carter, 4 Day (Conn.) 66; s. c. 4 Am. Dec. 185; Woodward v. Camp, 22 Conn. 461; Hathaway v. Payne, 34 N. Y. 106.

[35] Hibberd v. Smith, 4 Pac. Rep. 473. Subject in general. Harkreader v. Clayton, 56 Miss. 383; s. c., 11 Am. Rep. 594; State Bank v. Evans, 3 Green (N. J.) 155; s. c. 28 Am. Dec. 400; Miller v. Fletcher, 27 Gratt (Va.) 403; s. c. 21 Am. Rep. 356; Watkins v. Nash, Law R. 20 Eq. Cas. 202; s. c. 13 Eng. Rep. 781; Wheelwright v. Wheelwright, 2 Mass. 454; S. C. 3 Am. Dec. 66; Jackson v. Rowland, 6 Wend. 666; s. c. 22 Am. Dec. 557; Couch v. Meeker, 2 Conn. 302; s. c. 7 Am. Rep. 274; Chipman v. Tucker, 38 Wis. 43; s. c. 20 Am. Rep. 1; Patrick v. McCormick, 10 Neb. 1; Cotton v. Gregory, id. 125; Andrews v. Farnham, 29 Minn. 246.

[36] Bank of Healdsburg v. Bailhace, 3 W. C. Rep. 140; s. c. 4 Pac. Rep. 106. See subdivision on Necessity of Delivery.

deed taken effect only from its tradition or delivery;[37] and if it wants delivery it is void *ab initio*.[38] Delivery is either actual, *i. e.* by doing something and saying nothing, or else verbal, *i. e.* by saying something and doing nothing, or it may be by both.[39] And either of these may make a good delivery and perfect deed; for otherwise, albeit it be never so well sealed and written, yet is the deed of no force.[40] And though the party to whom it is made take it to himself, or happen to get it into his hands, yet will it do him no good, nor him that made it any hurt, until it be delivered.[41] And a deed may be delivered by the party himself that doth make it, or by any other by his appointment or authority precedent, or assent or agreement subsequent for "*omis ratihabitis mandato aequiparatus.*"[42] But until the deed of a married woman is acknowledged and certified according to the statute it has, as therein prescribed, no validity and is not in a condition to be delivered or accepted;[43] and a deed which is delivered in presence of a notary without such formalities, and is thereafter acknowledged and certified before him, is void.[44] Nor did a delivery take place when the notary handed the deed, as a completely executed document, to one of the directors of the bank to which it was to be given by the wife of a defaulting cashier, conveying her lands in satisfaction of his deficiency and in consideration of his restoration, where such director, on receiving it, promised not to deliver it until matters between the parties to it were arranged.[45]

*Voluntary Conveyances to Infants.*—The law presumes much more in favor of deeds in cases of voluntary settlements, especially to infants, than it does in ordinary cases of bargains and sale;[46] and because of the great confidence presumed to exist between the parties, the same degree of formality is not required, but the presumption of law in such cases is in favor of delivery.[47]

Chicago, Ill. JAS. P. OLIVER.

[37] See citations contained in next note.

[38] 2 Bl. Com. 308; Barr v. Schraeder, 32 Cal. 610. See further subdivisions on Necessity of Delivery.

[39] See subdivision on Requisites of Delivery.

[40] See subdivision on Necessity of Delivery.

[41] 1 Shepp. Touchst. 57.

[42] 1 Shepp. Touchst. 57; Bank of Healdsburg v. Bailhace, 3 W. C. Rep. 140; s. c. 4 Pac. 106.

[43] See Cal. Civil Code §§ 1186, 1187, 1191. "If a man seal and acknowedge before a mayor or other officer appointed for that purpose, a writing for a statute or recognizance, this acknowledement before such officer shall not amount to a delivery of the deed, so as to make it a good obligation, if it happen not to be a good statute or recognizance." 1 Shepp. Touchst. 58.

[44] Bank of Healdsburg v. Bailhace, 3 W. C. Rep. 140; s. c. 4 Pac. Rep. 106.

[45] Bank of Healdsburg v. Bailhace, 3 W. C. Rep. 140; S. C. 4 Pac. Rep. 106. For the director thus became the depositary of the deed and the agent for the wife, in which capacity he had no authority to deliver it unless he received instructions from her to that effect. no such instructions were given to him, and he recognized his position by afterwards returning the deed to his principal. Ibid. See Fitch v. Bunch, 30 Cal. 208.

[46] See cases next noted.

[47] Bryan v. Wash, 2 Gilm. (Ill.) 557; Walker v. Walker, 42 Ill. 311. See note to Vaughan v. Goodman, 3 N. E. Rep. 262; Masterson v. Check, 23 Ill. 72; Rivard v. Walker, 39 Ill. 413; Cecil v. Beaver, 28 Iowa 241; Spencer v. Carr, 45 N. Y. 410 Compare Ireland v. Geroughty, 15 Fed. Rep. 35.

## CONSTITUTIONAL LAW—HABEAS CORPUS—JURISDICTION — RELATIVE JURISDISDICTION OF STATE AND FEDERAL COURTS—JUDICIAL DISCRETION.

### EX PARTE WILLIAM L. ROYALL, No. 1, APPELLANT AND PLAINTIFF IN ERROR; EX PARTE WILLIAM L. ROYALL, No. 2, APPELLANT AND PLAINTIFF IN ERROR.

*Supreme Court of the United States, March 1, 1886.*

*Habeas Corpus U. S. Courts Jurisdiction of—Prisoner under State Process.*—The United States courts have jurisdiction to issue writs of habeas corpus in favor of persons restrained of their liberty under State process, or by any other authority when it is alleged under oath that they are held in custody in violation of the U. S. Constitition.

——— ———. *U. S. Courts—State Courts—Jurisdiction.*—Congress has power to authorize the United States Courts to issue the writ of habeas corpus in favor of persons held under State process, and to discharge them when restrained of their liberty in violation of the United States constitution, but the State courts cannot exercise the same power in the case of persons held under U. S. process.

——— ———. *Prisoner under State Process—Discretion of Courts.*—When a person is in custody under process from a State court having original jurisdiction, and it is claimed he is in custody in violation of the constitution, the U. S. Circuit Court has a discretion, whether it will discharge him in advance of his trial—that discretion to be subordinated to any special circumstances requiring immediate action. So after his trial, if he is convicted, it has a discretion, whether it shall discharge him by *habeas corpus*, or shall leave him to his writ of error from the highest court of the State.

Appeals from and in error to the Circuit Court

of the United States for the Eastern district of Virginia.

HARLAN, J. delivered the opinion of the court.

On the 29 day of May, 1885, William L. Royall filed two petitions in the Circuit Court of the United States for the Eastern District of Virginia, each verified by oath, and addressed to the judges of that court.

In one of them he represents, in substance, that he is a citizen of the United States; that, in June, 1884, as a representative of a citizen of New York —who was the owner of certain bonds issued by Virginia under the act approved March 30, 1871, entitled: "An act to provide for the funding and payment of the public debt"—he sold in the city of Richmond, to Richard W. Maury, for the sum of $10.50 in current money, a genuine past-due coupon, cut from one of said bonds in petitioner's presence, and which he received from the owner, with instructions to sell it in that city for the best market price; that said coupon bears upon its face the contract of Virginia that it should be received in payment of all taxes, debts, and demands due that Commonwealth; that he acted in said matter without compensation; and, consequently, the transaction was a sale of the coupon by its owner.

The petition proceeds:

"That on the second day of June, 1884, the grand jury of the city of Richmond, Virginia, found an indictment against your petitioner for selling said coupon without a license. That the before-mentioned coupon is the only one that your petitioner has sold. That your petitioner was thereupon arrested and committed to the custody of N. M. Lee, sergeant of the city of Richmond, to be tried on said indictment, and that he will be prosecuted and tried on said indictment for selling said coupon without a license, under the provisions of section 65 of the act of March 15, 1884, relating to licenses generally, and the general provisions of the State law in respect to doing business without a license. That your petitioner had no license under the laws of Virginia to sell coupons. That the act of the General Assembly under which your petitioner was arrested, and is being prosecuted, requires any person who sells one or more of the said tax-receivable coupons issued by said State of Virginia to pay to said State, before said sale, a special license tax of $1, 000, and, in addition thereto, a tax of twenty per cent. on the face value of each coupon sold.

"That said act does not require the seller of any other coupon, or the seller of anything else, to pay said tax, but it is directed exclusively against the sellers of such coupons. That your petitioner is being prosecuted under said act because he sold said coupon without having first paid to said State said special license tax, and without paying to her said special tax of twenty per cent. on the face value thereof. That said act of the General Assembly of Virginia is repugnant to section ten of article one of the constitution of the United States, and is therefore null and void. That if the said State can refuse to pay the said coupons at maturity, and then tax the sale of them to tax-payers, she may thus indirectly repudiate them absolutely, and thus effectually destroy their value.

"That your petitoner has been on bail from the time he was arrested until now, but that his bail has now surrendered him, and he is at this time in the custody of the said N. M. Lee, sergeant of the city of Richmond, to be prosecuted and tried on said indictment. That he is held in violation of the Constitution of the United States, as he is advised."

In the other petition he represents, in substance, that, under the provisions of the before-mentioned act of 1871, Virginia issued her bonds, with interest coupons attached, and bearing upon their face a contract to receive them in payment of all taxes, debts, and demands due to that Commonwealth; that another act, approved January 14, 1882, provides that said coupons shall not be received in payment of taxes until after judgment rendered in a suit thereon according to its provisions; that the validity of the latter act was sustained in Antoni v. Greenhow, 107 U. S., upon the ground that it furnished tax-payers with a sufficient remedy to enforce said contract; that by the provisions of §§ 90 and 91 of chapter 450 of the laws of Virginia for the year 1883-84, it is provided that attorneys-at-law who have been licensed to practice law less than five years shall pay a license tax of fifteen dollars, and those licensed more than five years twenty-five dollars, and that such license shall entitle the attorney paying it to practice law in all the courts of the State; that it is further provided by said 91st section that no attorney shall bring any suit on said coupons under said act of January 14th, 1882, unless he pays, in addition to the above-mentioned license tax, a further special license tax of $250; that petitoner had been licensed to practice law more than five years, and that in the month of April 1884, he paid twenty-five dollars, receiving a revenue license to practice law in all the courts of the State; but that he had not paid the additional special license tax provided for in said 91st section; that, under employment of a client who had tendered coupons, issued by Virginia under the act of March 30th, 1871, to the treasurer of Richmond city in payment of his taxes, and thereafter had paid his tax in money—the coupons having been received by that officer for identification and verification, and certified to the Hustings Court of the City of Richmond—he brought suit under the act of January 14th, 1882, to recover the money back after proving the genuineness of the coupons; that the grand jury of the city of Richmond thereupon found an indictment against him for bringing the suit without having paid the special license tax; that he brought it after he had paid his license tax above mentioned, and while he had a license to practice law until April 1885; that he was thereupon arrested by order of the Hustings Court of Richmond, committed to the custody of

N. M. Lee, sergeant of that city, and is about to be tried and punished under said indictment; that the act requiring him to pay a special license tax in addition to his general license tax is repugnant to § 10 of article 1 of the Constitution of the United States, and is, therefore, null and void; and that the act providing for punishing him for not paying the special license tax is likewise repugnant to the Constitution.

After stating, at some length, the grounds upon which he contends that the before mentioned acts are repugnant to the Constitution, the petitioner avers that he "is now in the custody of the said N. M. Lee, sergeant of the city of Richmond, under said indictment, and he is, therefore, restrained of his liberty in violation of the Constitution of the United States."

Each petition concludes with a prayer that the circuit court award a writ of *habeas corpus* directed to that officer, commanding him to produce the body of the petitioner before that court, together with the cause of his detention, and that he have judgment discharging him from custody.

In each case the petition was dismissed upon the ground that the circuit court was without jurisdiction to discharge the prisoner from prosecution.

These cases come here under the act of March 3, 1885, c. 353, which so amends § 764 of the Revised Statutes as to give this court jurisdiction, upon appeal, to review the final decision of the circuit courts of the United States in certain specified cases, including that of a writ of *habeas corpus* sued out in behalf of a person alleged to be restrained of his liberty in violation of the constitution. 23 Stat. 437.

The first question to be considered is, whether the circuit courts have jurisdiction on *habeas corpus* to discharge from custody one who is restrained of his liberty in violation of the national constitution, but who, at the time, is held under State process for trial on an indictment charging him with an offence against the laws of the State.

The statutory provisions which control the determination of this question are found in the following sections of the Revised Statutes:

"§ 751. The Supreme Court and the Circuit and District Courts shall have power to issue writs of *habeas corpus*.

"§ 752. The several justices and judges of the said courts, within their respective jurisdictions, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of restraint of liberty.

"§ 753. The writ of *habeas corpus* shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the Constitution, or of a law or treaty of the United States; or being a subject or citizen of a foreign State, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection or exemption claimed under the commission, or order, or sanction of any foreign State, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify.

"§ 754. Application for the writ of *habeas corpus* shall be made to the court, or justice, or judge authorized to issue the same, by complaint in writing, signed by the person for whose relief it is intended, setting forth the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what claim or authority, if known. The facts set forth in the complaint shall be verified by the oath of the person making the application.

"§ 755. The court, or justice, or judge to whom the application is made, shall forthwith award a writ of *habeas corpus*, unless it appear from the petition itself that the party is not entitled thereto. The writ shall be directed to the person in whose custody the party is detained.

"§ 761. The court, or justice, or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require."

It is further provided, that, pending the proceedings on *habeas corpus* in cases mentioned in sections 763 and 764—which include an application for the writ by a person alleged to be restrained of his liberty in violation of the Constitution of the United States—and, "until final judgment of discharge, any proceeding against the person so imprisoned or confined, or restrained of his liberty, in any State court, or by or under the authority of any State, for any matter so heard or determined, or in process of being heard and determined, under such writ of *habeas corpus*, shall be deemed null and void." § 766.

The grant to the Circuit Courts in § 751 of jurisdiction to issue writs of *habeas corpus*, is in language as broad as could well be employed. While it is attended by the general condition, necessarily implied, that the authority conferred must be exercised agreeably to the principles and usages of law, the only express limitation imposed is, that the privilege of the writ shall not be enjoyed by—or, rather, that the courts and the judicial officers named, shall not have power to award the writ to—any prisoner in jail, except in specified cases, one of them being where he is alleged to be held in custody in violation of the Constitution. The latter class of cases was first distinctly provided for by the act of February 5, 1867, c. 28, (14 Stat. 634), which declares that the several courts of the United States, and the several justices and judges thereof, within their respective jurisdictions, in addition to the authority then conferred by law, "shall have power to grant writs of *habeas*

*corpus* where any person may be restrained of his or her liberty in violation of the Constitution, or any treaty or law of the United States." Whether therefore, the appellant is a prisoner in jail within the meaning of § 753, or is restrained of his liberty by an officer of the law executing the process of a court of Virginia, in either case, it being alleged under oath that he is held in custody in violation of the Constitution, the Circuit Court has, by the express words of the statute, jurisdiction on *habeas corpus* to inquire into the cause for which he is restrained of his liberty, and to dispose of him "as law and justice require."

It may be suggested that the State court is competent to decide whether the petitioner is or is not illegally restrained of his liberty; that the appropriate time for the determination of that question is at the trial of the indictment; and that his detention for the purpose simply of securing his attendance at the trial, ought not to be deemed an improper exercise by that court of its power to hear and decide the case. The first of these propositions is undoubtedly sound; for, in Robb v. Connolly, 111 U. S. 637, it was held, upon full consideration, that "a State court of original jurisdiction, having the parties before it, may, consistently with existing Federal legislation, determine cases at law or in equity, arising under the Constitution and laws of the United States, or involving rights dependent upon such Constitution or laws;" and that "upon the State courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States, and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them." But with respect to the other propositions, it is clear, that, if the local statute under which Royall was indicted be repugnant to the Constitution, the prosecution against him has nothing upon which to rest, and the entire proceeding against him is a nullity. As was said in *Ex parte* Siebold, 100 U. S. 376. "An unconstitutional law is void, and is as no law. An offence created by it is no crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment." So, in *Ex parte* Yarborough, 110 U. S. 654, it was said that if the statute prescribing the offence for which Yarborough and his associates were convicted was void, the court which tried them was without jurisdiction, and they were entitled to be discharged. It would seem—whether reference be had to the act of 1867, or to existing statutory provisions—that it was the purpose of Congress to invest the courts of the Union, and the justices and judges thereof, with power, upon writ of *habeas corpus*, to restore to liberty any person, within their respective jurisdictions, who is held in custody, by whatever authority, in violation of the Constitution or any law or treaty of the United States. The statute evidently contemplated that cases might arise when the power thus conferred should be exercised, during the progress of proceedings instituted against the petitioner in a State court, or by or under authority of a State, on account of the very matter presented for determination by the writ of *habeas corpus*; for, care is taken to provide that any such proceedings, pending the hearing of the case, upon the writ, and until final judgment, and after the prisoner is discharged, shall be null and void. If such were not the clear implication of the statute, still, as it does not except from its operation cases in which the applicant for the writ is held in custody by the authority of a State, acting through its judiciary or by its officers, the court could not, against the positive language of Congress, declare any such exception, unless required to do so by the terms of the Constitution itself. But, as the judicial power of the nation extends to all cases arising under the Constitution, the laws and treaties of the United States; as the privilege of the writ of *habeas corpus* cannot be suspended unless when in cases of rebellion or invasion the public safety may require; and as Congress has power to pass all laws necessary and proper to carry into execution the powers vested by the Constitution in the Government of the United States, or in any department or officer thereof; no doubt can exist as to the power of Congress thus to enlarge the jurisdiction of the courts of the Union and of their justices and judges. That the petitioner is held under the authority of a State cannot affect the question of the power or jurisdiction of the Circuit Court to inquire into the cause of his commitment and to discharge him, if he be restrained of his liberty in violation of the Constitution. The grand jurors who found the indictment, the court into which it was returned and by whose order he was arrested, and the officer who holds him in custody, are all, equally with individual citizens, under a duty, from the discharge of which the State could not release them, to respect and obey the supreme law of the land, "anything in the Constitution and laws of any State to the contrary notwithstanding." And that equal power does not belong to the courts and judges of the several States; that they cannot, under any authority conferred by the States, discharge from custody persons held by authority of the courts of the United States, or of commissioners of such courts, or by officers of the general government acting under its laws, results from the supremacy of the Constitution and laws of the United States. Ableman v. Booth, 21 How. 506; Tarble's Case, 13 Wall. 397; Robb v. Connolly, 111 U. S. 639.

We are, therefore, of opinion that the Circuit Court has jurisdiction upon writ of *habeas corpus* to inquire into the cause of appellant's commitment, and to discharge him, if he be held in custody in violation of the Constitution.

It remains, however, to be considered, whether the refusal of that court to issue the writ and to take the accused from the custody of the State of-

ficer can be sustained upon any other ground than the one upon which it proceeded. If it can be, the judgment will not be reversed because an insufficient reason may have been assigned for the dismissal of the petitions.

Undoubtedly the writ should be forthwith awarded, "unless it appears from the petition itself that the party is not entitled thereto;" and the case summarily heard and determined "as law and justice require." Such are the express requirements of the statute. If, however, it is apparent upon the petition, that the writ if issued ought not, on principles of law and justice, to result in the immediate discharge of the accused from custody, the court is not bound to award it as soon as the application is made. *Ex parte* Watkins, 3 Pet. 193, 201; *Ex parte* Milligan, 4 Wall. 3, 111. What law and justice may require, in a particular case, is often an embarrassing question to the court or to the judicial officer before whom the petitioner is brought. It is alleged in the petitions—neither one of which, however, is accompanied by a copy of the indictment in the State court, nor by any statement giving a reason why such a copy was not obtained—that the appellant is held in custody under process of a State court in which he stands indicted for an alleged offense against the laws of Virginia. It is stated in one case that he gave bail, but was subsequently surrendered by his sureties. But it is not alleged and it does not appear, in either case, that he is unable to give security for his appearance in the State court, or that reasonable bail is denied him, or that his trial will be unnecessarily delayed. The question as to the constitutionality of the law under which he is indicted must necessarily arise at his trial under the indictment, and it is one upon which, as we have seen, it is competent for the State court to pass. Under such circumstances, does the statute imperatively require the circuit court, by writ of *habeas corpus*, to wrest the petitioner from the custody of the State officers in advance of his trial in the State court? We are of opinion that while the circuit court has the power to do so, and may discharge the accused in advance of his trial if he is restrained of his liberty in violation of the National Constitution, it is not bound in every case to exercise such a power immediately upon application being made for the writ. We cannot suppose that Congress intended to compel those courts, by such means, to draw to themselves, in the first instance, the control of all criminal prosecutions commenced in State courts exercising authority within the same territorial limits, where the accused claims that he is held in custody in violation of the Constitution of the United States. The injunction to hear the case summarily, and thereupon "to dispose of the party as law and justice require" does not deprive the court of discretion as to the time and mode in which it will exert the powers conferred upon it. That discretion should be exercised in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the States, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution. When the petitioner is in custody by State authority for an act done or omitted to be done in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or where, being a subject or citizen of a foreign State, and domiciled therein, he is in custody, under like authority, for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign State, or under color thereof, the validity and effect whereof depend upon the law of nations; in such and like cases of urgency, involving the authority and operations of the general government, or the obligations of this country to, or its relations with, foreign nations, the courts of the United States have frequently interposed by writs of *habeas corpus* and discharged prisoners who were held in custody under State authority. So, also, when they are in the custody of a State officer, it may be necessary, by use of the writ, to bring them into a court of the United States to testify as witnesses. The present cases involve no such considerations. Nor do their circumstances, as detailed in the petitions, suggest any reason why the State court of original jurisdiction may not, without interference upon the part of the courts of the United States, pass upon the question which is raised as to the constitutionality of the statutes under which the appellant is indicted. The circuit court was not at liberty, under the circumstances disclosed, to presume that the decision of the State court would be otherwise than is required by the fundamental law of the land, or that it would disregard the settled principles of constitutional law announced by this court, upon which is clearly conferred the power to decide ultimately and finally all cases arising under the Constitution and laws of the United States. In Taylor v. Carryl, 20 How. 595, it was said to be a recognized portion of the duties of this court — and, we will add, of all other courts, National and State — "to give preference to such principles and methods of procedure as shall seem to conciliate the distinct and independent tribunals of the States and of the Union, so that they may co-operate as harmonious members of a judicial system co-extensive with the United States, and submitting to the paramount authority of the same Constitution, laws, and Federal obligations." And in Covell v. Heyman, 111 U. S. 182, it was declared "that the forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of the other, is a principle of comity, with, perhaps, no higher sanction than the utility which comes from concord; but between State courts and those

of the United States it is something more. It is a principal of right and of law, and, therefore, of necessity."

That these salutary principles may have full operation, and in harmony with what we suppose was the intention of Congress in the enactments in question, this court holds that where a person is in custody, under process from a State court of original jurisdiction, for an alleged offense against the laws of such State, and it is claimed that he is restrained of his liberty in violation of the Constitution of the United States, the circuit court has a discretion, whether it will discharge him, upon *habeas corpus*, in advance of his trial in the court in which he is indicted; that discretion, however, to be subordinated to any special circumstances requiring immediate action. When the State court shall have finally acted upon the case, the circuit court has still a discretion whether, under all the circumstances then existing, the accused, if convicted, shall be put to his writ of error from the highest court of the State, or whether it will proceed, by writ of *habeas corpus*, summarily to determine whether the petitioner is restrained of his liberty in violation of the Constitution of the United States. The latter was substantially the course adopted in *Ex parte* Bridges, 2 Woods, 428. The prisoner was indicted and convicted in one of the courts of Georgia for perjury committed in an examination before a United States commissioner under what is known as the Enforcement Act of congress. He was discharged upon *habeas corpus*, sued out before Mr. Justice Bradley, upon the ground that the State court had no jurisdiction of the case, the offense charged being one which, under the laws of the United States, was exclusively cognizable in the Federal courts. Adverting to the argument that where a defendant has been regularly indicted, tried, and convicted in a State court, his only remedy was to carry the judgment to the State court of last resort, and thence by writ of error to this court, he said: "This might be so if the proceeding in the State court was merely erroneous; but where it is void for want of jurisdiction, *habeas corpus* will lie, and may be issued by any court or judge invested with supervisory jurisdiction in such case. *Ex porte* Lange, 18 Wall. 163." It was further observed, in the same case, that while it might appear unseemly that a prisoner, after conviction in a State court, should be set at liberty by a single judge on *habeas corpus*, there was no escape from the act of 1867, which invested such judge with power to discharge when the prisoner was restrained of his liberty in violation of a law of the United States.

As it does not appear that the circuit court might not, in its discretion and consistently with law and justice, have denied the applications for the writ at the time they were made, we are of opinion that the judgment in each case must be affirmed, but without prejudice to the right of the petitioner to renew his applications to that court at some future time, should the circumstances render it proper to do so.

Affirmed.

NOTE.—In its proper domain the national government is superior to the State governments, yet neither can intrude into the domain of the other, except where in cases of conflict of authority such intrusion may be necessary on the part of the national government to preserve its rightful supremacy.[1]

For a long period of time Congress was very careful in its legislation to avoid all possibility of conflict between the National and State courts. The National courts were prohibited from issuing injunctions against proceedings in State courts, and it was decided, that they could not indirectly enjoin such proceedings by enjoining the litigants.[2] It was equally careful in *habeas corpus* proceedings, and allowed the writ to run in favor of prisoners in jail, only when they were held under or by color of the authority of the United States. Owing to the nullification proceedings of 1833, the writ was allowed to any person imprisoned for an act done or omitted in pursuance of a law of the United States or of an order of a U. S. court or of a judge thereof.

The Canadian troubles caused the act of 1842 to be passed extending the writ to aliens in prison, who claimed to have acted under the orders of their own government. The civil war was the cause of the act of 1867, extending the provisions of the writ to persons in custody in violation of the Constitution or of a law or treaty of the United States.[3] The language of the act is very sweeping, and authorizes the discharge of a prisoner in custody of a State court or even serving out a sentence of such court. This power is permissible to the United States courts because of their superiority to the State courts, and for the same reason State courts cannot interfere by *habeas corpus* with the proceedings of the United States courts.[4]

*Writ of Error—Correction of Errors.*—The writ of *habeas corpus* was never intended to operate as an appeal or writ of error. On a writ of *habeas corpus* the court will only inquire, whether the court, under whose process the prisoner is held, had jurisdiction over the person or the cause, or whether there is some other matter rendering its proceeding void.[5]

*Habeas Corpus—Nature of Proceedings*—Proceedings to enforce civil rights are civil proceedings, consequently a *habeas corpus* proceeding is a civil proceeding.[6]

*When Writ not Allowed.*—When the court, which holds the prisoner, has jurisdiction of the party and is charged with the trial of such cases, the prisoner will not be discharged because he has a good defense. He will be left to avail himself of his defense at his trial.[7]

*Can a Court Refuse to Discharge the Prisoner if his Case Comes Under the Provisions of the Law.*—The District and Circuit Courts of the United States seem to have considered themselves bound to discharge

1 Tarble's Case, 13 Wall. 397.

2 Haines v. Carpenter, 91 U. S. 254; Dial v. Reynold, 96 U. S. 340.

3 *Ex parte* Bridges, 2 Woods, 428.

4 Tarble's Case, *supra*; Ableman v. Booth, 21 How. 506.

5 *Ex parte* Siebold, 100 U. S. 371; *Ex parte* Virginia, Id. 339; *Ex parte* Rowland, 104 U. S. 604; *Ex parte* Curtis, 106 U. S. 371; *Ex parte* Yarbrough, 110 U. S. 651; *Ex parte* Kenyon, 6 Dill. 385; *Ex parte* Watkins, 3 Pet. 193; *Ex parte* Lange, 18 Wall. 163; *Ex parte* Parks, 3 Otto, 18; *Ex parte* Reed, 100 U. S. 556.

6 *Ex parte* Tom Tong, 108 U. S. 556.

7 *Ex parte* Crouch, 112 U. S. 178.

prisoners when their cases came under the provisions of the law; they seem not to have considered our dual form of government or the courtesy due to the State courts. They discharged the prisoners, whether held by preliminary commitment, or under sentence for contempt of court, or serving out their sentences under the judgment.[8] In one case the prisoner was not discharged, but the court admitted that the legal points involved were doubtful, and the Supreme Court of the State had passed on the question, and had come to a different conclusion.[9]

The writ of *habeas corpus* is a high prerogative writ, and is considered a bulwark of our liberties. It was secured by magna charta, and the effort of the authorities to avoid issuing it, and to delay its enforcement, led to the act of Charles 1st on that subject, and to that of 31st Charles 2d, which has been called a new magna charta. The law says the court shall forthwith award the writ, shall proceed in a summary way to determine the facts, and "thereupon to dispose of the party as law and justice require." This evidently means that the decision shall be rendered as soon as practicable after the evidence is heard. What do law and justice require? That the prisoner shall be discharged, if the law covers his case. Justice is blind, and pays equal deference to the humblest as to the highest. Is it law or justice to hear the prisoner's case, and to admit he is wrongfully detained, and, with the power and command to act according to law and justice, to remand him with the statement that hereafter another tribunal will listen to his cause, and no doubt will do him justice; and, if not, then he may appeal to another tribunal, or possibly we will then discharge him ourselves.

By what reasoning does the court arrive at its conclusion? It says, "If it is apparent upon the petition that the writ, if issued, ought not, on principles of law and justice, to result in the immediate discharge of the accused from custody, the court is not bound to award it as soon as the application is made. *Ex parte* Watkins, 3 Pet. 193, 201; *Ex parte* Milligan, 4 Wall. 3, 111." We cannot find that inference in those cases. As we understand them, the facts all appeared by the petitions, so the court saved time by deciding the cases on the petitions, in one case deciding that the prisoner was not entitled to a discharge, and in the other that he was.

In the principal case the opinion says the court can exercise a discretion, and should try to avoid any clash with the State courts, and can conclude to leave the matter with the State court. The legislative branch of the government makes the laws, and is the arbiter in questions of courtesy. The courts must enforce the laws as they find them, and certainly this law is peremptory. It may be admitted, that it would be well for congress to alter the law. According to this decision the court is authorized to grant or refuse the writ at its pleasure, and no applicant can tell in advance, whether, with no dispute as to the facts, he will obtain it. An intimation is thrown out, that in important causes, or in international questions, it should be granted. The right to be discharged from illegal confinement by the writ of *habeas corpus*, in the case of even the humblest of our citizens, is not an unimportant matter, or else we have not read the history of the English peoples aright.

S. S. MERRILL.

[8] Laundry Ordinance Case. 7 Sawy. 531; *In re* Wong Yung Quy, 6 Sawy. 237; *Ex parte* Bridges, 2 Woods, 428; *Ex parte* Turner, 3 Woods, 603; *In re* Tie Loy, 26 Fed. Rep. 611; *Ex parte* Kenyon, 5 Dill. 385; Electoral College of South Carolina, 1 Hughes, 571; United States v. Jailor of Fayette Co., 2 Abb. U. S. 265; *Ex parte* Jenkins, 2 Wall. Jr C. C. 521, 539; *Ex parte* Robinson, 6 McLean, 355; United States v. Morris, 2 Am. Law Reg. 348.

[9] *In re* Wo Lee, 26 Fed. Rep. 471.

## CONSTITUTIONAL LAW—OBLIGATIONS OF CONTRACTS—STATE POWER OF TAXATION—RELINQUISHMENT OF—

### VICKSBURG, S. & P. R. CO. v. DENNIS.

*Supreme Court of the United States, March 1. 1886.*

1. CONSTITUTIONAL LAW—*Obligation of Contracts—State Statute Impairing—State Power of Taxation—Relinquishment — Presumptions — Exemption of Railroad Company—Statute—Effect of Words—Act of Former Officer—Controlling Effect upon Successor and upon the Force of the Statute.*—In determining whether a statute of a State impairs the obligation of a contract, the Supreme Court must decide for itself the existence and effect of the original contract, (although in the form of a statute,) as well as whether its obligation has been impaired.

2. A State is never to be presumed to have relinquished its power of taxation unless its intention so to do is clearly expressed in language to that effect.

3. The words of a statute being that certain railroad property "shall be exempt from taxation for ten years after the completion of said road within the limits of this State," such words as distinctly exclude the time preceeding the completion of the road as the time succeeding the 10 years after completion.

4. The omission of the taxing officers of a State to assess, in previous years, certain property cannot control the duty imposed by law upon their successors, or the power of the legislature, or the legal construction of the statute under which the exemption is claimed.

FIELD, MILLER, and BRADLEY, JJ., and WAITE, C. J., dissent.

In Error to the Supreme Court of the State of Louisiana.

*E. M. Johnson*, *Geo. Hoadly*, and *Edw. Colston*, for plaintiff in error. *John S. Young* and *Thos. O. Benton*, for defendant in error.

GRAY, J. The original suit was brought by the sheriff and *ex officio* collector of taxes of the parish of Madison, in the State of Louisiana, to recover the amount of taxes assessed, under general laws of the State, in 1877 and 1878 to the Vicksburg, Shreveport & Texas Railroad Company, and in 1880 to the Vicksburg, Shreveport & Pacific Railroad Company, upon 34 miles of railroad with fixtures and appurtenances, in that parish. The Vicksburg, Shreveport & Texas Railroad Company was incorporated on April 28, 1853, by a statute of Louisiana, to construct and maintain a railroad from a point in the Parish of Madison, on the Mississippi River opposite Vicksburg, westward by way of Monroe and Shreveport to the line of the State of Texas. Sec. 2 of that statute was as follows: "The capital stock of said company shall be exempt from taxation, and its road, fixtures, workshops, warehouses, vehicles of transportation, and other appurtenances shall be exempt from taxation for ten years after the completion of said road within the limits of this State." The eastern part of the railroad, from Vicksburg to Monroe, about 75 miles, was completed before January 1, 1861; and the western part, from Shreveport to the Texas line, about 25 miles, was completed before January

1, 1862; leaving the central part, from Monroe to Shreveport about 100 miles, uncompleted. The further construction of the road was prevented and suspended during the civil war, and much of the track, bridges, stations, and workshops was destroyen by the hostile armies. Soon after the return of peace, a holder of four out of a large number of bonds secured by a mortgage executed by the corporation on September 1, 1857, of its railroad property, and franchises, commenced a suit in the court of the State of Louisiana, and obtained a decree for the sale of the whole mortgaged property, and it was sold under that decree. Upon a suit afterwards brought by a very large number of the bondholders, in behalf of all, in the Circuit Court of the United States, that sale was, by a decree of this court, at October term, 1874, annulled as fraudulent and illegal, and the railroad, property, and franchises ordered to be sold for the benefit of the bondholders and other creditors of the corporation. Jackson v. Ludeling, 2 Wall. 616. On December 1, 1879, they were sold pursuant to this decree, and purchased by a committee of the bondholders, who on the next day organized themselves, with their associates, into a corporation under the general statute of Louisiana of March 8, 1877, by the name of the Vicksburg, Shreveport & Pacific Railroad Company, and now claimed to be entitled, under this statute, to all the rights, powers, privileges, and immunities of the Vicksburg, Shreveport & Texas Railroad Company, including its exemption from taxation. In 1881 and 1882 the new corporation made contracts for the competition of the railroad between Monroe and Shreveport, and began to complete it; but it has not yet been completed. The Supreme Court of Louisiana held that the provision of the statute of 1853, exempting the railroad, fixtures and appurtenances "from taxation for ten years after the completion of said road," did not relieve the old corporation from taxation before the road was completed, and therefore gave judgment for the plaintiff, without determining whether the new corporation had succeeded to the rights of the old one in this respect. Dennis v. Vicksburg, S. & P. R. Co., 34 La. Ann. 954. A writ of error was sued out by the defendant, and allowed by the chief justice of that court, because there was drawn in question the validity of a statute of, or an authority exercised under the State, on the ground of its being repugnant to the Constitution of the United States, as impairing the obligation of contracts, and the decision was in favor of its validity.

In determining whether a statute of a State impairs the obligation of a contract, this court doubtless must decide for itself the existence and effect of the original contract (although in the form of a statute), as well as whether its obligation has been impaired. Louisville & N. R. R. v. Palmes, 109 U. S. 244, 256, 257; s. c., 3 Sup. Ct. Rep. 193, and cases cited; Wright v. Nagle, 101 U. S. 791, 794. But the construction given by the Supreme Court of Louisiana to the contract relied on in the present case accords, not only with its own decision in the earlier case of Baton Rouge R. R. v. Kirkland, 33 La. Ann. 622, but with the principles often affirmed by this court.

In the leading case of Providence Bank v. Billings, 4 Pet. 514, Chief Justice Marshall, speaking of a partial release of the power of taxation by a State in a charter to a corporation, said: "That the taxing power is of vital importance, that it is essential to the existence of government, are truths which it cannot be necessary to re-affirm." "As the whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed, in a case in which the deliberate purpose of the State to abandon it does not appear." "We must look for the exemption in the language of the instrument; and if we do not find it there, it would be going very far to insert it by construction." 4 Pet. 561-563. In Philadelphia & W. R. v. Maryland, 10 How. 376, Chief Justice Taney said: "This court on several occasions has held that the taxing power of a State is never presumed to be relinquished, unless the intention to relinquish is declared in clear and unambiguous terms." 10 How. 393. In the subsequent decisions the same rule has been strictly upheld and constantly reaffirmed, in every variety of expression. It has been said that "neither the right of taxation, nor any other power of sovereignty, will be held by this court to have been surrendered, unless such surrender is expressed in terms too plain to be mistaken;" that exemption from taxation "should never be assumed unless the language used is too clear to admit of doubt;" that "nothing can be taken against the State by presumption or inference; the surrender, when claimed, must be shown by clear, unambiguous language, which will admit of no reasonable construction consistent with the reservation of the power; if a doubt arises as to the intent of the legislature, that doubt must be solved in favor of the State;" that a State "cannot by ambiguous language be deprived of this highest attribute of sovereignty;" that any contract of exemption "is to be rigidly scrutinized, and never permitted to extend, either in scope or duration, beyond what the terms of the concession clearly require;" and that such exemptions are regarded "as in derogation of the sovereign authority and of common right, and, therefore, not to be extended beyond the exact and express requirement of the grants, construed *strictissimi juris*." Jefferson Branch Bank v. Skelly, 1 Black, 436, 446; Gilman v. Sheboygan, 2 Black, 510, 513; Delaware Railroad Tax, 18 Wall. 206, 225, 226; Hoge v. Railroad Co., 99 U. S. 348, 355; Southwestern R. R. v. Wright, 116 U. S. 231, 236; S. C. ante, 375; Erie Ry. v. Pennsylvania, 21 Wall. 492, 499; Memphis Gas-Light Co. v. Shelby Taxing District, 109 U. S, 398, 401; S. C. 3 Sup. Ct. Rep. 205; Tucker v. Ferguson, 22 Wall. 527,

575; West Wisconsin Ry. v. Supervisors, 93 U. S. 595, 597; Memphis & L. R. R. R. v. Railroad Com'rs, 112 U. S. 609, 617, 618; S. C. 5 Sup. Ct. Rep. 299.

It is argued, in support of this writ of error, that as the exemption from taxation of the capital stock was unqualified and perpetual, and began at the very moment of the creation of the corporation, the further exemption of the railroad and its appurtenances, conferred in the same section, was intended to begin at the same moment, although limited in duration to 10 years after the completion of the road; and that the legislature, while exempting the railroad from taxation for 10 years after its completion, could not have intended to subject it to taxation before its completion, and while its earnings were little or nothing. On the other hand, it is argued that the consideration of the exemption from taxation, as of all the franchises and privileges granted by the State to the corporation, was the undertaking of the corporation to prosecute to completion within a reasonable time the work of building the whole railroad from the Mississippi to the Texas line; that one reason for defining the exemption of the railroad and its appurtenances from taxation as "for ten years after the completion of said road," without including any time before its completion, was to secure a prompt execution of the work, and to prevent the corporation from defeating the principal object of the grant, and prolonging its own immunity from taxation, by postponing or omitting the completion of a portion of the road; and that the State had never allowed a similar exemption to take place except after a railroad had been entirely finished; and this argument is supported by the opinions of the supreme court of Louisiana in State v. Morgan, 28 La. Ann. 482, 491, and in the case at bar, 34 La. Ann. 954, 958.

Each of these arguments rests too much on inference and conjecture to afford a safe ground of decision, where the words of the statute creating the exemption are plain, definite and unambiguous. In their natural and their legal meaning, the words "for ten years after the completion of said road" as distinctly exclude the time preceding the completion of the road as the time succeeding the 10 years after its completion. If the legislature had intended to limit the end only, and not the beginning, of the exemption, its purpose could have been easily expressed by saying, "until," instead of "for," so as to read, "until ten years after the completion," leaving the exemption to begin immediately upon the granting of the charter. To hold that the words of exemption actually used by the legislature include the time before the completion of the road would be to insert by construction what is not to be found in the language of the contract; to presume an intention, which the legislature has not manifested in clear and unmistakable terms, to surrender the taxing power, and to go against the uniform current of the decisions of this court upon the subject, as shown by the cases above referred to.

The omission of the taxing officers of the State in previous years to assess this property cannot control the duty imposed by law upon their successors, or the power of the legislature, or the legal construction of the statute under which the exemption is claimed.

In the case of Morgan v. Louisiana, 93 U. S. 217, affirming the decision in 28 La. Ann. 482, neither this court nor the supreme court of Louisiana expressed any opinion upon the question now before us, because both courts held that the sale of the railroad in that case having taken place before the passage of the statute of 1877, whatever rights were conferred by a similar clause of exemption had not passed to the purchasers. Judgment affirmed.

FIELD, J., (dissenting.) I am obliged to dissent from the judgment in this case. I agree with the majority, in all that is said in the opinion, as to the construction of the statutes which are alleged to exempt from the taxing power of the the State, property within its jurisdiction. Where there is a reasonable doubt as to their construction, whether or not they create the exemption, it should be solved in favor of the State. But here it does not seem to me there can be any such doubt. The statute in question declares that the capital stock of the company "shall be exempt from taxation; and its roads, fixtures, workshops, warehouses, vehicles of transportation and other appurtenances shall be exempt from taxation for ten years after the completion of said road within the State." This exemption was designed to aid the road, and was therefore much more needed during the construction than when completed. It seems like a perversion of the purpose of the statute to hold that it intended to impede by its burden the progress of the desired work, and relieve it of the burden only when finished. The enterprise is to be nursed, according to the majority, not in its infancy, but when successfully carried out and needs no support.

I am authorized to say that the Chief Justice, Mr. Justice MILLER, and Mr. Justice BRADLEY concur with me in this dissent.

NOTE.—In regard to the construction by the United States Supreme Court of a State statute which is alleged to be in violation of the Federal Constitution, as impairing the obligation of a contract, it is said, in Louisville &c. R. R. v. Palmes,[1] "in reaching a conclusion on that point, we decide for ourselves, independently of the decision of the State court, whether there is a contract, and whether its obligation is impaired: and if the decision of the question as to the existence of the alleged contract requires a construction of State Constitutions and laws, we are not necessarily governed by previous decisions of the State courts upon the same or similar points, except where they have been so firmly established as to constitute a rule of property; such has been the uniform and well settled doctrine of this court."[2] The same principle was held in Wright

[1] 109 U. S., 244.

[2] Bank v. Knoop, 16 How. 369.

v. Nagle,[3] and to these authorities may now be added the principal case. But of course the converse of this proposition will not hold. For the rulings of the Supreme Federal Tribunal, on all constitutional questions of this character, are of paramount and binding force.

There is no lack of authority to support the doctrine that a state legislature may waive the right of taxation, in a particular instance, for a limited or unlimited period, and that if this intention is manifested in unequivocal terms, it constitutes a contract which must not be impaired by the subsequent levying of a tax.[4] For example, where all the property of a corporation is by its charter exempted from taxation, a subsequent law exempting only such property as is in immediate use by institutions of that character, cannot apply to the corporation in question.[5] Nevertheless, a contract of this kind is always to be construed, most strictly against the corporation and in favor of the State; every reasonable doubt is to be resolved in favor of the latter; and the legislature will never be understood to have waived the right of subjecting the property and franchises of the corporation to the imposition of taxes unless the intention to do so is expressed in the grant itself in language too plain and explicit to be mistaken. These statements are amply borne out by the reasoning of Mr. Justice Gray in the principal case, as well as by the long list of authorities which he cites. And the reason of this rule is based upon two considerations. First, as suggested by the learned justice, the power of taxation is one of the highest attributes of sovereignty, essential to the existence of government, and necessary to the welfare of the community; and therefore its relinquishment should never be presumed unless expressly declared. And in the second place, upon the familiar doctrine of the common law that the sovereign is never bound by a statute unless particularly named in it, and hence, by an easy deduction, that the powers and prerogatives of sovereignty are never to be abrogated or curtailed, except by explicit and unambiguous words of concession. Nor is this rule confined to the waiver of the right of taxation. It applies equally to all alleged restrictions upon the power of future legislatures. Thus, while it is well settled that the State may grant exclusive privileges to a corporation (unless forbidden by its own constitution), and thereby preclude itself from conferring similar franchises upon any other body within the specified limits or during the stipulated time,[6] yet if the privileges granted to the corporation are not made exclusive by the clear and unmistakable language of the act, the State is not debarred from incorporating a second body for similar puposes, though the interest and profits of the first are thereby injuriously affected.[7]

Another line of cases presents a further view of the doctine under consideration, viz: That there must be a special consideration for the grant of an extraordinary privilege, like that of exemption from taxation; that if no bonus is paid by the corporation, no right surrendered to the public, no service or duty or additional obligation imposed upon the corporators as a consideration for it, it is no contract at all, but a mere spontaneous concession on the part of the legislature, and therefore revocable at will.[8]

It is to be observed that the fact that four judges dissented from the conclusion reached by the majority of the court, in the principal case, does not at all weaken the force of the decision as an authority for the principles of law therein laid down. The court was unanimous as to the rule of construction to be applied to the statute under consideration, but its members entertained different views as to the probable intention of the legislature in enacting it.

H. CAMPBELL BLACK.

[3] 101 U. S., 791.

[4] Home of the Friendless v. Rouse, 8 Wall. 430; Delaware Railroad Tax, 18 Wall. 206; Asylum v. New Orleans, 105 U. S. 368; New Jersey v. Wilson, 7 Cranch, 166; Bank v. Knoop, 17 How. 376; Gordon v. Appeal Tax Court, 3 How. 133; Wilmington R. R. v. Reid, 13 Wall. 266; Humphrey v. Pegues, 16 Wall. 249; Farrington v. Tennessee, 95 U. S. 689.

[5] University v. People, 99 U. S. 309.

[6] West River Bridge v. Dix, 6 How. 507; Binghamton Bridge, 3 Wall. 51; Shorter v. Smith, 9 Ga. 529; Piscataqua Bridge v. N. H. Bridge, 7 N. H. 35; Castar v. Brush, 25 Wend. 628; California Telegraph Co. v. Alta Telegraph Co., 221 Cal. 398; Bridge Co. v. Hoboken Land Co., 2 Beasley, 81; Collins v. Sherman, 31 Miss. 679.

[7] Turnpike Co. v. State, 3 Wall. 210; Shorter v. Smith, 9 Ga. 517; Collins v. Sherman, 31 Miss. 679; Fort Plain Co. v. Smith, 30 N. Y. 44.

[8] Christ Church v. Philadelphia, 24 How. 300; Washington University v. Rowse, 42 Mo. 308; People v. Commissioners of Taxes, 47 N. Y. 501; Hospital v. Philadelphia, 24 Pa. St. 229.

## WEEKLY DIGEST OF RECENT CASES.



1. ANNUITY.—*Legacy—Trust—Trustee.* — There is no priority between annuitants and legatees when there is a deficiency of assets; both must abate alike, unless the testator has otherwise specifically provided. Trustees are to conduct themselves faithfully, and, in the exercise of a sound discretion, invest trust funds, not with a view of speculation, but rather to make a permanent disposition of the funds with a due regard for their probable income and safety. *Emery v. Batchelder*, S. C. Me., April 28, 1886, N. Eng. R., Vol. 2, 68.

2. COMMON CARRIER.—*Bill of Lading — Liability Beyond Terminus Unless Limited by Contract.*— "The rule is settled in this State," says Chief-Justice Stone, in delivering the opinion of the court, "that where a carrier receives goods consigned to a place beyond the terminus of his own route, without limiting his liability by express agreement, by the acceptance of the goods he assumes the duty and incurs the obligation to deliver them safely at the point of destination. M. & G. R. R. Co. v. Copeland, 63 Ala. 219. And this is the declared rule in a majority of the best considered cases. Illinois Central R. R. Co. v. Copeland, 24 Ind. 332; Id. v. Johnson, 34 Ill. 389; Southern Express Co. v. Shea, 38 Ga. 519; Little v. Semple, 8 Mo. 99; Hill Manfg. Co. v. B. & L. R. R. Co., 104 Mass. 122; Railroad Co. v. Pratt, 22 Wall. 123; Weed v. S. & S. R. R. Co., 19 Wend. 534; Burtis v. B. & St. L. R. Co., 24 N. Y. 269; Quinby v. Vanderbilt, 17 N. Y. 315; Lock Co. v. R. R. Co., 48 N.

H. 339; Noyes v. R. R. Co., 27 Ver. 110; Perkins v. R. R. Co., 47 Me. 573; Carter v. Peck, 4 Sneed, 203; Mosher v. Southern Express Co., 38 Ga. 37." *Louisville & Nashville R. R. Co. v. Meyer*, S. C. of Ala., December Term, 1885-86.

3. ——— ———. *Limitation of Liability Beyond Terminus—Requisites of Validity of.*—A common carrier may limit the stern liability imposed on him by the common law, by a special agreement brought home to the consignor, and acquiesced in by him, provided it does not attempt to excuse the want of proper care and diligence in himself or his agents, and is not otherwise unreasonable. The opinion of the court continues: "No man can, in such service, bargain for an immunity from the effects of a want of that degree of diligence the nature of the service demands. And to render such limitation of liability available as an excuse or defense, it must be shown to have been accepted or acquiesced in by the consignor. Courts scrutinize such asserted exceptions with a watchful eye. Steele v, Townsend, 37 Ala. 247; S. & N. R. R. Co. v. Henlien, 52 Ala. 606; R. R. Co. v. Manfg. Co., 16 Wall. 318; R. R. Co. v. Lockwood, 17 Wall. 387; Chouteaux v. Leech, 18 Pa. St. 224; F. & Mech. Bank v. C. Transp. Co., 56 Amer. Dec. 68, and note; note to Cole v. Goodwin, 32 Amer Dec. 495-507; Hutch. on Car., §§ 240, *et seq.*; Angell on Car., §§ 220, *et seq. Ibid.*

4. ——— ———. *What Insufficient to Charge Consignor with Notice of Limitation in Bill of Lading.*—When no bill of lading is delivered to the consignor on the receipt of the goods, but a printed form is filled up, leaving only a blank for the freight rate when ascertained, a sum of money being deposited by the consignor to pay the entire freight; and the bill of lading is then sent by mail to the consignor, never having been read over by him; this is not sufficient to charge him with notice of and acquiescence in a stipulation contained therein, limiting the liability of the carrier to losses occurring on his own line. *Ibid.*

5. CONSTITUTIONAL LAW.—*Municipal Corporations—Special Privileges.*—A statute enacted for the protection of a municipal corporation, if it relates to the exercise of a governmental power, is not unconstitutional because it does not also apply to persons or private corporations, or even to other municipal corporations. A municipal corporation, being a governmental agency, does not stand upon the same footing as to legislation as individuals or private corporations, save where it lays aside its sovereignty or public character, and acts in matters not governmental. A statute providing that no action for damages of any character whatever to either person or property shall be instituted or maintained against appellee, "unless such action be commenced within six months after the accrual of the cause of action," is *held* not to be unconstitutional in an action against the city to recover for injuries to property resulting from a street improvement. *Preston v. Louisville*, Ky. Ct. of E. & App., May 1, 1886, Ky. L. Rep., Vol. 7, 797.

6. CRIMINAL LAW.—*Self-Defense — Resisting Unlawful Arrest.*—The taking of human life is not justified by the fact that it is necessary to prevent an unlawful arrest. Such an arrest is but a trespass on the person and liberty of the citizen, and in resisting the arrest he is not justified in taking the life of the trespasser unless it is necessary to save his own life or to save his person from great bodily harm. *Creighton v. Commonwealth*, Ky. Ct. of E. & App., April 27, 1886, Ky. L. Rep., Vol. 7, 795.

7. ——— ———. *Forgery — Person — Indictment — Plea in Abatement — Waiver.*—Where a forgery is committed after the death of the man whose name purports to be signed to the instrument, it is proper to charge that the intent was to defraud his estate, as the estate of a decedent is, in law, regarded as a person. It is not error to sustain a demurrer to a plea in abatement which is uncertain and defective because of an incomplete sentence. Where there is no plea, but a trial is had, the objection that there was a trial without a plea must be made in the trial court, or it will be deemed waived. *Billings v. State*, S. C. Ind., April 23, 1886, N. E. Rep., Vol. 6, 914.

8. DEED.—*Notice—Record—Mortgage.*—A grantee, under a conveyance, without knowledge of a prior, unrecorded conveyance, acquires a good title as against a tenant under such unrecorded deed; and whether his conveyance be in fee simple absolute or in mortgage, it entitles him to the possession of the demanded premises. The statute of 1883, chap. 223, § 14, has not the effect to convert a writ of entry into a bill in equity; demandant must still declare according to his legal title, and if an equitable defense is admissible at all, it is only when, if established, it would absolutely and unconditionally defeat the demandant's claim for possession under his title. *Sherman v. Galbraith*, S. J. C. Mass., April 1, 1886, N. Eng. R., Vol. 2, 89.

9. EQUITY.—*Injunction Remedy Cannot be Invoked to Enjoin Proceedings Void Ab Initio.*—Equity cannot be invoked to enjoin proceedings which are void *ab initio*, as where the petition alleges that the court, which rendered the judgment upon which execution issued, sought to be enjoined, had no jurisdiction; for such judgment is void, as well as the execution issued thereon, and the petitioner's remedy is ample and adequate at law, for suit will lie against the officer attempting to levy the execution as a trespasser, and the purchaser's pretended title would be valueless. 23 Mo. 443; 22 Id. 90; 44 Id. 500; High on Injunc., §§ 89 and 125; 2 Story Eq. Jur., § 898, and cases cited. *St. Louis, etc. R. Co. v. Reynolds*, S. C. Mo., June 7, 1886.

10. ESTATE.—*Fee Tail Special—Life Estate—Remainder.*—A husband conveyed land to a trustee for the benefit of his wife and the heirs of her body, born in wedlock with him. Subsequently, after the death of the trustee, the husband and wife transferred and assigned to B. the rents and profits arising, and to arise, from the land above conveyed, to secure a certain judgment debt held by B. against the husband. In an action by the wife's heirs for possession of lands, after her death: *Held*, that the deed to the trustee created an estate in fee-tail special. 2 Bl. Com. 114. The effect of § 5, p. 355, R. S. Mo. 1855, which abolished estates in fee tail, was to create in the wife a life estate only, with remainder in fee to her heirs, and upon the death of their mother the heirs became entitled to possession. The husband or wife could do no more than dispose of the life estate. The husband had no estate by curtesy, for such an estate is not an incident to a life estate. 12 Mo. 359. *Phillips v. Laforge*, S. C. Mo., June 7, 1886.

11. EVIDENCE.—*One Party to Transaction Dead—Testimony of Circumstances.*—Where one party

to a transaction is dead, thus rendering the other incompetent to testify, it is proper to resort to any testimony of circumstances having a tendency to shed light upon the transaction, as here reading in evidence a note made between the parties, and found among the papers of the deceased party. *Kinchelo v. Priest*, S. C. Mo., June 7, 1886.

12. GUARDIAN AND WARD.—*Liability on Bond.*—A guardian who accepts from his predecessor in the trust a note payable to such predecessor individually, is guilty of a breach of duty which renders him liable on his bond. *State, ex rel. v. Greensdale*, S. C. Ind., May 19, 1886, N. E. Rep., Vol. 6, 926.

13. HUSBAND AND WIFE.—*Warranty—Estoppel.*—Where a married woman is not liable by statute upon her covenants of warranty, her act of joining with her husband in a conveyance of his land will not estop her from asserting an after-acquired title in her own name, and acquired by her own means. Where appellant was in possession of land and the legal title was in him, he could not acquire a lien upon the land for taxes paid by him. *Snoddy v. Leavitt*, S. C. Ind., February 17, 1886, West. Rep., Vol. 3, 360.

14. INSURANCE.—*Life Insurance.*—A life insurance company cannot be charged as trustee in an action at law against a beneficiary named in a policy which had become a claim, and which was made payable to the assured, his executors, administrators and assigns, for the sole use and benefit of the beneficiary named. Upon the death of the assured, intestate, his administrator is the only person who could maintain an action at law against the company for the insurance under such a policy, where no assignment had been made. *Stowe v. Phinney*, S. C. Me., May 17, 1886, N. Eng. R., Vol. 2, 74.

15. LIEN OF DEED OF TRUST.—*Payee of Note Cannot Discharge by Entering Satisfaction on Record Margin, when.*—The payee of a note secured by a deed of trust cannot, after he has assigned the note, discharge the property of the lien as between a *bona fide* purchaser of the property and the assignee of the note, by entering satisfaction of the debt on the margin of the record. 62 Mo. 459; 73 Id. 19; 77 Id. 383; 84 Mo. 487. *Lee v. Clark*, S. C. Mo., June 7, 1886.

16. MANDAMUS—*Cannot Control Judgment or Discretion of an Inferior Court—Adequate Remedy by Appeal Bars Remedy by Mandamus.*—Mandamus will not lie to control the judgment or discretion of an inferior court, for this in effect would be to substitute the opinion of the superior for that of the inferior court. 16 Ga., 13; High on Extra Legal Rem., §§ 171, 176, 156. The existence of another adequate and specific remedy by appeal bars the exercise of jurisdiction by mandamus, for such a writ is not to usurp the functions of a writ of error or appeal, or to correct error which may be corrected in that way. High on Extra Leg. Rem., § 188. *State ex rel. v. McGown*, June 7, 1886.

17. MORTGAGES.—*Lien—Vendor and Vendee.*—A mortgage, if valid at the place where executed, is valid everywhere, and a mortgagee of personalty in another State may follow it into this State and foreclose the mortgage in the county where it may be found. 45 Ga., 549. Where a mortgage on personal property was regularly made and recorded in another State, and the property having been brought into this State, the mortgagee followed it and foreclosed his mortgage in the county where the property was found, and caused it to be levied, which was done before the expiration of the time allowed for the registry of such a mortgage in this State, the foreclosure was valid as against a *bona fide* purchaser of the property without notice of the encumbrance, although the mortgage was not recorded in this State until after foreclosure. Code, §§ 1956, 1957. *Hubbard v. Andrews*, S. C. Ga., June 1, 1886, Ga., Rep. Vol. 1, 478.

18. PARTITION—*Primary Object—When Questions of Title May be Raised—Effect of Adjudication—Descent and Distribution—Children of the First Wife Inherit From Childless Second Wife—Title During Her Life—Estoppel—Quitclaim Deed—After-Acquired Title.*—While the primary object of an action in partition is not to settle conflicting titles, nor to create and vest a new title, but to sever the unity of possession, and allot the respective shares, yet the question of title may be presented and settled, and the adjudication will be final and conclusive as between the parties; but it can only operate upon existing titles, and will not affect after-acquired titles. Under the Indiana statute of descents, a childless second wife takes one-third of the husband's lands at his death by descent, free from all demands of his creditors, and at her death the children by the first wife take the same by inheritance from the second wife, and not from the father; so that, while she is alive, they have no present title. A quitclaim deed will not estop the grantor from setting up an after-acquired title. *Thorp v. Hanes*, S. C. Ind., May 11, 1886, N. E. Rep. Vol. 6, 920.

19. PARTNERSHIP—*Dissolution — Constructioc of Articles—Accounting—Note..*—A partnership consisting of three persons agreed that they should dissolve, and the retiring partner should sell his interest in the firm to the remaining partners. Though the respective contributions to firm capital were unknown, they shared equally in profits and losses. Articles of dissolution provided that, for the purpose of determining the interest of the retiring partner, the shares of two of the partners, "as they stand on the books," should be added together, and the interest of the retiring partner should "be adjusted upon the basis of one equal half part of such sum." Provision was also made for an appraisement. The firm books, before the appraisement, showed an apparent excess of assets over liabilities materially larger than the real excess as shown by the appraisement. At an attempted agreement before the appraisement the interests were calculated upon the basis of the apparent excess of assets over liabilities, and at a subsequent agreement the interests in the real excess, as shown by the appraisement, were calculated upon the same basis. The retiring partner, who had refused the first settlement, accepted a firm note his share at the second. Subsequently the remaining partners declared that the second settlement was erroneous because the shares of the partners, as they stood on the books at the dissolution, had not had charged against each of them one-third of the amount of the reduction made by the appraisers, or one-third of the difference between the apparent and real excess of assets over liabilities, which defense they set up in an action upon the note given to the retiring partner. *Held*, that to refuse a recovery upon the note would be

to change the construction which all parties interested had put upon the articles of dissolution, and had acquiesced in for a year subsequently; that, therefore, the retiring partner could recover upon the note. *Wilson v. Fenimore*, S. C. Penn. April 19, 1886. Atl. R. Vol. 3, 796.

20. *Tax Collectors—Not Debtors to State, but Bailees—Degree of Diligence required.*—The statutory provisions prescribing the duties of tax collectors (Code of Alabama, §§ 414, 503, 4265, 4275), requiring them to pay into the treasury the taxes collected in the same character of funds as received, and prohibiting their use or conversion of the moneys collected, are irreconcilable with the theory that the collector is a debtor, and liable as such for the public moneys collected, and show that he occupies a relation analogous to that of a bailee; yet, not that of an ordinary bailee for hire, but on considerations of public policy, charged with the highest degree of care and diligence—such as a very prudent and cautious man exercises in respect to the most important matters. *The State of Alabama v. Houston.* S. C. Ala. Dec. Term, 1885-86.

21. TAXATION—*Railroad Companies—Assessment of Taxes—Roadway—Fences—State Board of Equalization—Jurisdiction—Judgment for Taxes—Entire Tax Against Different Kinds of Property Separately Assessed.*—In an action against a railroad company to recover taxes under an assessment made by the State Board of equalization, which assessment includes the fences erected upon the roadway of the company, the fences cannot be regarded as a part of the roadway for the purpose of taxation, but are "improvements" assessable by the local authorities only of the county in which they are situated. Where an action is brought by the State against a railroad company for the recovery of taxes, and the plaintiff seeks judgment for an entire tax arising upon an assessment of different kinds of property as a unit, such assessment, including property not legally assessable by the State board of equalization, and the part of the tax assessed against the latter property not being separable from the other part, an assessment of that kind is invalid, and the plaintiff is not entitled to recover. *County of Santa Clara v. Southern etc. Co.*, S. C. U. S. May 10, 1886, S. C. Rep. Vol. 6, 1132.

22. TAX COLLECTOR.—*Monthly Payment to State—What not Sufficient Excuse for Holding.*—In requiring the tax-collector to make monthly payments into the treasury, it is not contemplated that he shall carry it in person; hence, his personal illness, disabling him to travel, does not excuse his default unles it also prevented him from providing for the safe transmission of the money. The taxes may be sent or forwarded. It is incumbent upon the collector, that he may be acquitted of fault or neglect to show that he had no opportunity after the money was received, to pay over the taxes, either on the warrant, previous to the robbery, or to the treasurer by the time required by law. An overruling necessity may be regarded as sufficient to exempt him from fault or neglect, otherwise arising from an omission to perform those duties; but sickness, which disables to travel, and to attend personally to business, is not of itself sufficient. It must be further shown, that by reason of the sickness, or from other causes, he was unable to provide a safe transmission of the money to the proper receiving officer. Less than this does not answer the requirements of his strict accountability. *State v. Houston*, S. C. Ala. Dec. Term. 1885.

23. TAX COLLECTOR.—*Robbery by Irresistible Force when Defense to Action and when not.*—If the collector, having exercised the highest degree of care, diligence and vigilance, to prevent loss, is robbed of the public moneys by irresistible force, which he could not have forseen or guarded against, this constitutes a good defense to an action on his official bond. While the official bond does not impose absolute and unconditional liability, the statutory provisions and considerations of public policy enlarge the degree of responsibility beyond that of a mere bailee for hire; and if, having observed the highest care, diligence, and vigilance to prevent loss, the collector is robbed of money belonging to the State by irresistible force, it constitutes a valid defense to an action on his bond for the recovery of such money. It is said, money belonging to the State, for if it appears that the specific funds received by the collector have been used or changed for any unauthorized purpose, he becomes *eo instanti* a debtor, and he and his sureties are bound to absolute payment, as for a debt. In such case subsequent robbery of money substituted for the amount misused, is no defense. The robbery must be of money the property of the State. *Ibid.*

24. TROVER AND CONVERSION.—*Agent or Servant Assisting in Wrongful Disposition of Property.*—An agent or servant who, acting solely for his master or principal, and by his direction, and without knowing of any wrong, or being guilty of gross negligence in not knowing of it, disposes of, or assists the master in disposing of, property which the latter has no right to dispose of, is not thereby rendered liable for a conversion of the property. *Leuthold v. Fairchild*, S. C. Minn., May 4, 1886, N. W. Rep., Vol. 28, 218.

25. TRUST.—*Liability of one Negligently Failing to Perform Gratuitous Trust.*—Where a person assumes to collect notes for another, where it does not appear that he was to receive compensation, while in discharge of such trust, fails to exercise the same kind of care that an ordinarily prudent man would exercise in his own business affairs, but negligently permits the statute of limitations to run against a part of such notes, and, by reason of such neglect the debt is lost, such person is liable. *Kinchelo v. Priest*, S. C. Mo., June 7, 1886.

26. WATERS AND WATER-COURSES.—*Diversions of Water-Course—Eminent Domain.*—Where a railroad company inserted a pipe in the back-water of a dam, and upon their own property, and pumped water therefrom, to supply their tanks, in such quantities as to seriously diminish the supply required by a lower riparian proprietor for the running of his paper-mill, it was held that the right of the railroad company was only to use the water so as not to sensibly diminish the stream to the riparian owner below. If the company requires more than its share it must resort to the right of eminent domain. Under such circumstances, it is not necessary that there should be a proceeding by a jury of view, under the act of assembly May 16, 1857. *Pennsylvania, etc. Co. v. Miller*, S. C. Pa., April 19, 1886, Atl. Rep., Vol. 3, 780.

## QUERIES AND ANSWERS.*

*[Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.]*

### QUERIES.

1. A., a country wood dealer goes to B., a city wood and coal dealer and asks B. whether he wants to buy a carload of wood. B. answers, "yes," A. says, I will ship a carload to you and have it put on your side track. A. then orders of B. a load of coal and says to B., "you can take your pay out of the wood—you can put it in the account against the wood"—B. delivers the coal and the carload of wood comes in and is put on his side track. A. then refuses to sell carload of wood to B. Has B. a lien on the carload of wood for the coal which he delivered to A. who is utterly irresponsible? H.

### QUERIES ANSWERED.

*Query No. 47.* [22 C. L. J., 527.]—A. makes a note to B., reading, "Three years after date, for value, I promise to pay, etc., with eight per cent. interest per annum." Is the interest on above note due at the end of each year, so B. may sue for same, or must he wait till the three years are up? Please cite authorities.

G. & F.

*Answer.*—"When a note is made payable at a future day with interest at a prescribed rate per annum, such interest does not become due or payable until the principal sum does, unless there is a special provision in the note in contract to that effect. Tanner v. Dundee Land Investment Co., 8 Sawyer, C. Ct. 187. Reported in U. S. Digest, New Series, Vol. XIV.

A. W. L.

*Query No. 30.* [22 Cent. L. J. 267.]—Suppose A. purchases of B., a wholesale dealer, 3 sacks of beans, each containing 2 bushels and worth $1.50 per bushel, and the sacks are set apart for delivery but not paid for. In the afternoon of the same day C. purchases of B., 3 sacks of coffee each containing 120 lbs. and worth 25c. per lb. These sacks are also set apart for delivery but not paid for, and are similar in appearance to the sacks containing the beans. None of the sacks are marked in any way. The next day A. calls for the beans pays the price, viz.: $9; but the delivery clerk by mistake gives him the three sacks of coffee. A. afterwards discovered the mistake and took the coffee to D., a retailer, and sold it, put the money in his pocket and absconded. C. comes for his coffee but finds beans awaiting him instead. B. now brings an action of replevin against D., the *bona fide* purchaser, for the recovery of the coffee. Will the action lie? If so on what grounds? A LAW STUDENT.

*Answer*—In order that A. could pass the title of the coffee to D., there must have been a contract of sale of the coffee by B. to A., and not merely a delivery of the possession of the coffee by B. to A. In that case there would be a contract, by which B. had transferred the ownership to A., no matter whether it was induced by fraud and could be set aside by B. or not. The ownership being in A., he could, prior to the reclamation of the property by B., sell and deliver it to an innocent purchaser. Benjamin on Sales, § 433, and numerous cases cited. There being no contract of sale of the coffee between B. and A., A. had no title to it, and could convey none, and it can be replevied from D. If the coffee is the property of B. he can replevy it. If the contract of sale of the coffee to C. has been completed, as the case as stated implies. B. can still replevy it as a bailee in possession of it. S. S. M.

*Query No. 31.* [22 Cent. L. J. 287.]—A. traded a team of horses to B., who is totally insolvent, for a piece of real estate, B. giving a warranty deed to the premises and also representing to A. that the premises were free from incumbrances. After receiving the deed, A. learns that B. had no title to the property, and within three days after the trade is made, replevies the horses from B., before a justice of the peace. Can this action be maintained, and is this showing an incumbrance on real estate, such an inquiry into the title to real estate so as to deprive the justice of jurisdiction or defeat the action? A SUBSCRIBER.

*Answer*—A sale and delivery of goods, procured through the fraudulent representations of the buyer, and with intent to cheat the seller, may be avoided by the latter, and he may recover his goods by replevin. Wells on Replevin, 181, § 318, and cases cited. So A. can replevy the horses. "Subscriber" does not give the law relative to a justice's jurisdiction, about the construction of which he is inquiring. If he refers to the law of Missouri, he will find that the title to the real estate must be an issue in the case (1 Rev. St. Mo. § 2931). The mere fact that the title to real estate must be shown on the trial of the case, does not oust the jurisdiction of the justice. Wilson v. Petty, 21 Mo. 417. S. S. M.

## CORRESPONDENCE.

### INTER STATE GARNISHMENT, AGAIN.

*To the Editor of the Central Law Journal:*

The following authorities have not been referred to on the subject of inter-state garnishment of wages and may be of interest and value to some of the readers of the CENTRAL LAW JOURNAL.

It was recently held by the Supreme Court of Kansas in the case of Kansas City, St. J. & C. B. R. Co. v. Gough, 10 Pac. Rep. 88, that the earnings of a debtor for his personal services at any time within three months next preceding the attempt to subject such earnings to the payment of his debts are exempt, under § 490 of the Civil Code and § 157 of the justices' act, from such payment, if it be made to appear that such earnings are necessary for the maintenance of his family, supported wholly or partly by his labor; and as the statute of the State does not restrict the exemption to residents, the courts have no authority to make such restriction; therefore no distinction is to be made between residents and non-residents.

Where a citizen of this State attempts, by a proceeding in garnishment against a foreign railroad corporation, to subject to the payment of his claim, in the courts of this State, the personal earnings of a citizen of another State, which personal earnings are by the laws of this state, and also of such other State, exempt from being so applied, the earnings of such debtor are exempt from such process. Burlington & M. R. R. Co v. Thompson, 31 Kan. 180, S. C. 1 Pac. Rep. 622, distinguished. Kansas City, St. J. & C. B. R. Co. v. Gouch, (Kan.) 10 Pac. Rep. 89.

It was said in Mooney v. Union Pacific Ry. Co., 14 N. W. Rep. 343, that a debt due from one who may be sued in this State to a non-resident of the State of Iowa for services performed in the State of his residence, may be garnisheed in a suit instituted against him in

the courts of this State, personal service or service by publication having been duly made on him, although his salary has always been paid in the State where he lived, and would have been exempt by the laws of that State. See Oberfelder v. Union Pac. Ry. Co., (Iowa,) 14 N. W. Rep. 255.

It was held in Broadstreet v. Clarke, (Iowa,) 22 N. W. Rep. 919, that the exemption laws of another State or territory cannot be pleaded or relied upon as a defense by either the garnishee or the judgment debtor in a proceeding in Iowa.

The court say: "We regard it as the settled rule in this State, that the exemption laws of another State or territory cannot be pleaded or relied on as a defense by either the garnishee or judgment debtor;" citing Newall v. Hayden, 8 Iowa, 140; Leiber v. Union Pac. Ry. Co., 49 Iowa, 688; Mooney v, Union Pac. Ry. Co., (Iowa,) 14 N. W. Rep. 343; and Burlington & M. R. R. v. Thompson, (Kan.) 1 Pac. Rep. 622.

It was held in Albrecht v. Treitschke, (Neb.) 22 N. W. Rep. 418, that where a judgment creditor procuree the exempt wages due a laborer to be taken by garnishee process, and applied to the payment of his judgment, a cause of action arises in favor of the judgment debtor against the creditor for the amount of such wages wrongfully appropriated, unless the right of exemption is waived by the debtor. JAS. M. KERR.

St. Paul, Minn.

## RECENT PUBLICATIONS.

THE TORRENS SYSTEM of Transfer of Land, A Practical Treatise on the "Land Title Act of 1885," Ontario; and the "Real Property Act of 1885," Manitoba, Embracing the Latest Decisions, both in England, Australia and Canada, together with a Brief History of the Origin and Principles of the System; the Forms, Methods of Administration and Copious Index. By Herbert C. Jones, Esq., of Trinity College, Toronto, M. A.; of the University of Toronto, B. A.; of Osgoode Hall, Barrister, Advocate in the Province of Quebec; the Author of "Jones on Prescription," and "The McCarthy Bill," of 1883, entitled "An Act for the Declaration of Titles to Land and to Facilitate its Transfer in the Northwest Territories." Toronto: Carswell & Co., 26 and 28 Adelaide street, East, 1886.

This work is worthy of very serious study by legislators and others interested in the reform of the law, and the elimination of cumbrous, antiquated, useless and expensive forms and methods connected with the transfer of titles to real estate. The volume, as shown by its title, is a treatise on the Canadian statutes, in which are embodied the principles of the Torrens system of the transfer of land. That system, it may be remarked, is in force in the several provinces of Australia and its operation there and in Canada seems to be highly satisfactory. In Canada it is a new thing, but in Australia it has stood the test of twenty years experience.

The vital principles underlying the whole system is that the absolute and limited ownership of lands shall always appear upon the Register's books of the Register's office; that no title shall be admitted to registration until it has been examined and certified to be absolute and perfect by the Register or Master of Titles, who is, presumably, a competent person, and whose duty it is to make all necessary examinations; that the registration of a title under his authority is the best evidence of title; that no transfer of title, either absolute or by way of a mortgage, has any validity whatever, until it has received his sanction and been duly registered. The rule is that the title to land shall pass, not by the execution of a deed, but by the registration of a transfer, which is not a matter of common right, but can only be permitted after the appropriate official examination by the Registrar.

The system is a very commendable effort to escape from the thraldom of feudal traditions and usages, as well as many restrictions which in the lapse of centuries have grown out of and among feudal usages. The complete success and fruition of the system would seem to be, placing all the muniments of title in a given district, under charge of a competent officer whose books will always show at a single glance who owns the fee simple of an estate, and at the same time, and in the same connection, by what liens, mortgages or other incumbrances it is affected. The effect, it is alleged, is to render it much easier to ascertain the precise condition of the title to real estate, and to dispense with the necessity, upon each transfer, of a long, laborious and expensive examination of record books, which in many places in this country have become absolutely multitudinous. The work is worthy of a much closer examination than we have been able to give it, and the system it embodies is in many respects worthy of imitation.

## JETSAM AND FLOTSAM.

WE once had a call from a client at our office during business hours, in which he did a good deal of social talking, but contrived to extract a good deal of advice from us about a proposed transfer of a house to his wife in view of the claims of certain creditors. He went away, and acted according to our advice. When we sent in a bill for advice some months afterwards, he was genuinely surprised, and explained: "Why, my dear fellow, I was visiting you?" "Never mind," we said, "now I am visiting you—with the consequences." He paid up.

THERE is something of the shrewd humor of the Oriental Cadi in the decision of a Russian stipendiary magistrate, a report of which has just reached us from Odessa. It appears that a new cemetery is about to be opened near that city, and that two Greek merchants, each anxious to secure the most comfortable or most distinguished resting-place, were allowed, by some official blunder, to buy the same allotment. When the mistake was discovered, neither would yield his claim, and the matter was referred to the district judge. Greek had met Greek, and the tug of war threatened to be severe, when the magistrate, with an astuteness worthy of Solomon, arranged the matter in the simplest way possible by applying the rule, "First come, first served," and suggesting that whichever died first should have the right to the coveted resting-place. The parties went away reconciled and happy. It is not stated whether they had to find sureties to guarantee that neither would take an unfair advantage of the other by committing suicide.

In speaking of a learned sergeant who gave a confused and elaborate explanation of some point of law, Curran observed, that whenever that grave counselor endeavored to unfold a principle of law, he put him in mind of a fool whom he once saw try to open an oyster with a rolling pin.